CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 87

A. M. ANDERSON, RECEIVER OF NATIONAL BANK OF KENTUCKY, LOUISVILLE, KENTUCKY, PETITIONER,

vs.

IRVIN YUNGKAU, EXECUTOR OF THE ESTATE OF ALBERT YUNGKAU, DECEASED; H. E. FRANZ, EXECUTOR OF THE ESTATE OF WILLIAM R. GILPIN, DECEASED; LUCY LOGAN MASSIE, EXECUTRIX OF THE ESTATE OF WILLIAM K. MASSIE, DECEASED, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 12, 1946.

CERTIORARI GRANTED MAY 13, 1946.

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IN THE

District Court of the United States

EASTERN DISTRICT OF KENTUCKY

No. 4081

A. M. ANDERSON, RECEIVER OF THE NATIONAL BANK OF KENTUCKY, OF LOUISVILLE, KENTUCKY,

Plaintiff,

v.

JOHN L. BRADY, ET AL.,

Defendants.

STIPULATION AS TO RECORD ON APPEAL

The parties agree that the questions presented by this appeal can be determined by the Appellate Court without an examination of all the pleadings, and they further agree that the following shall be considered a statement of the case showing how the questions arose and were decided in the District Court.

This suit was filed in the United States District Court for the Eastern District of Kentucky on February 18, 1936. The allegations of the petition were identical to the allegations contained in the suit filed in the Western District of Kentucky wherein the Receiver sought to recover stock assessments from shareholders of the BancoKentucky Company, which suit is known as *Anderson* v. *Ab-*

bott, and which action was appealed to the United States Circuit Court of Appeals for the Sixth Circuit and there docketed as number 8852, and which case was ultimately appealed to the Supreme Court of the United States and decided in favor of the Receiver in the case of *Anderson* v. *Abbott,* 321 U. S. 349.

Among the persons listed as defendants at the time of the filing of the suit in the Eastern District of Kentucky, were Alexander B. Massey, Ben Williamson, James H. Kitchen, John W. Kitchen, William K. Massie, William R. Gilpin and Albert Yungkau. Each of the parties named above was served.

On July 8, 1944, the following motion was filed:

> "Now comes Irvin Yungkau, Executor of the Will of Albert Yungkau, Deceased, and moves the Court to dismiss this action so far as Albert Yungkau is concerned because the same was not revived as provided in Rule 25 within two years after the death of Albert Yungkau, Albert Yungkau having died on July 19, 1941, a citizen and resident of Boyd County, Kentucky, and no steps having been taken to revive the action against him or to substitute his executor in his place as provided in Rule 25, and in support of said motion files the order of the Boyd County Court showing the appointment of Irvin Yungkau as executor, and the affidavit of Irvin Yungkau.
>
> H. R. Dysard,
> Dysard and Dysard,
> Attorneys for Irvin Yungkau,
> Ashland, Boyd County, Kentucky."

(The order of appointment and the affidavit referred to are omitted in printing this record, the matters having been subject to stipulation which will be referred to hereinafter.)

On October 18, 1944, the following order was entered in this cause:

"This day came LeWright Browning, Esq., and suggested of record the death of the defendants Harry S. Swope, Frances H. Williamson, Rush R. Williamson, Ben Williamson, J. A. Sparks, Virginia K. Fitch, John H. McCleary, James H. Kitchen and John W. Kitchen.

"This 18th day of October, 1944.

(s) Mac Swinford,
Judge."

On October 18, 1944, the following order was entered:

"This day came Hattie C. Field, Blanche Clay, H. E. Franz, Martha Mary Moore Fagan and Iris Ramey, by counsel, and tendered an offer to file their respective affidavits suggesting the deaths of Timothy A. Field, Wade H. Clay, William R. Gilpin, Lucy Coles Moore, and Harry H. Ramey, and their respective motions to dismiss this action as to said deceased defendants. . . ."

(The balance of said order is not pertinent to this matter and is omitted.)

On said October 18, 1944, the following motion to dismiss was filed:

"Comes H. E. Franz, and moves the Court as follows: To dismiss this action as to the defendant William R. Gilpin, for the reason that William R. Gilpin died on January 23, 1937 and his personal representative was not substituted herein, nor was the action revived as to his estate, all of which more clearly appears in the affidavit of H. E. Franz, attached hereto and marked Exhibit 'A.'

(s) R. W. Davis,
Attorney for the Estate of
William R. Gilpin, Ashland,
Kentucky."

(The affidavit is not copied for the reason that the subject matter contained therein is included in a stipulation which will be referred to at a further point.)

On October 18, 1944, the following suggestion of death was filed in the United States District Court:

> "Now comes LeWright Browning, Esq., counsel of record for the defendants Harry S. Swope, Frances H. Williamson, Rush W. Williamson, Ben Williamson, James A. Sparks, Virginia K. Fitch, John H. McCleary, James H. Kitchen and John W. Kitchen, and respectfully suggests of record the death of said named defendants; that the death of each of said defendants occurred more than two years prior to this date.
>
> "This 18th day of October, 1944.
>
> (s) LeWright Browning."

On November 20, 1944, the following motion was filed:

> "Now comes Henry G. Sandifer, Executor of the Estate of Alexander B. Massey, Deceased, defendant herein, and without entering his appearance in this cause, states that Alexander B. Massey died January 24, 1941, as appears in the affidavit of J. A. Stith, funeral director of Danville, Kentucky, who conducted decedent's funeral; that within two years after decedent's death, substitution of the proper parties has not been made, and asks that this cause be dismissed as to said decedent.
>
> (s) Henry G. Sandifer,
> (s) R. T. Dickerson."

(The affidavit referred to is not copied for the reason that a stipulation on the subject matter is referred to in a subsequent filing.)

On December 14, 1944, the following stipulation was agreed to:

"Judge Marx:

"We move orally that the action against Albert Yungkau be revived against Irvin Yungkau, executor of the estate of Albert Yungkau, deceased.

"STIPULATION

"1. The above motion having been made in open court, notice of the making of such action and of the making of the motion orally is waived and Irvin Yungkau, executor of the estate of Albert Yungkau, deceased, having entered his appearance by his counsel for the purpose of opposing said motion and for no other purposes and by stipulation of the parties, it is agreed that the same may be heard on the oral motion without further notice or time.

"2. Albert Yungkau, the defendant, died July 19, 1941.

"3. His will was probated July 28, 1941, and his estate was immediately delivered to the beneficiaries of his will.

"4. Revivor is sought by motion against Irvin Yungkau, executor of the estate of Albert Yungkau, deceased.

"5. A. M. Anderson, Receiver of the National Bank of Kentucky, did not know of the death of Albert Yungkau until July 6, 1944, and after the two year period fixed by Rule 25 had expired.

"6. A. M. Anderson, as such Receiver, has brought actions against approximately five thousand defendants, and all told there were approximately six thousand shareholders of the BancoKentucky Company. These shareholders lived in all parts of the United States and some of them in foreign countries, and during the years that the actions have been in progress many of them have changed their residence from one place to another, and Mr. Anderson has had a limited staff at his disposal, and it has been impracticable and, in fact, impossible to learn of the movements and residences and even the death of defendants, and with-

out such knowledge he could not bring actions for revivor until after he learned of the death.

"7. It is agreed that Mr. Anderson has been diligent in the performance of his duty.

"8. Albert Yungkau was a resident of the City of Ashland, Boyd County, Kentucky, for more than forty years prior to his death, and was at the time of his death a resident of the City of Ashland, Boyd County, Kentucky. His picture and notice of his death were carried in the newspapers circulating in this locality and a notice of his death was also carried in the Cincinnati Enquirer.

(s) Harry Kasfir,
Nichols, Wood, Marx & Ginter,
Counsel for A. M. Anderson,
Receiver.

(s) H. R. Dysard,
Dysard and Dysard,
Counsel for Irvin Yungkau,
Executor of the Estate of Albert Yungkau, Deceased."

On December 14, 1944, the following order was entered:

"This cause coming on for hearing upon the suggestion of record of the death of the defendant, Albert Yungkau, thereupon came the plaintiff and moved the Court to revive this action against Irvin Yungkau, Executor of the Estate of Albert Yungkau, Deceased, and said personal representative having entered his appearance by his counsel for the purpose of opposing said motion and for no other purpose, and having agreed that the same could be heard on oral motion without further notice of time, and said matters having been submitted to the Court upon an agreed statement of facts, and the Court being advised,

"It is considered, ordered and adjudged that said motions for revivor be, and the same are now overruled, and that this action be and the same is now dismissed as to the defendant, Albert Yungkau.

"This 14th day of December, 1944.

(s) Mac Swinford, Judge."

On December 14, 1944, the following stipulation was filed in the United States District Court:

"Judge Marx:

"We move orally that the action against William R. Gilpin be revived against H. E. Franz, Executor of the Estate of William R. Gilpin, Deceased.

"STIPULATION

"1. The above motion having been made in open court, notice of the making of such action and of the making of the motion orally is waived and H. E. Franz, Executor of the Estate of William R. Gilpin, Deceased, having entered his appearance by his counsel for the purpose of opposing said motion and for no other purpose, and by stipulation of the parties, it is agreed that the same may be heard on the oral motion without further notice or time.

"2. William R. Gilpin, the defendant, died January 23, 1937.

"3. His will was probated February 22, 1937, and his estate is still open and undistributed.

"4. Revivor is sought by motion against H. E. Franz, Executor of the Estate of William R. Gilpin, Deceased.

"5. A. M. Anderson, Receiver of the National Bank of Kentucky, did not know of the death of William R. Gilpin until July 1944, and after the two year period fixed by Rule 25 had expired.

"6. A. M. Anderson, as such Receiver, has brought actions against approximately five thousand defend-

ants, and all told, there were approximately six thousand shareholders of the BancoKentucky Company. These shareholders lived in all parts of the United States and some of them in foreign countries, and during the years that the actions have been in progress many of them have changed their residence from one place to another, and Mr. Anderson has had a limited staff at his disposal, and it has been impracticable and, in fact, impossible to learn of the movements and residences and even the death of defendants, and without such knowledge he could not bring actions for revivor until after he learned of the death.

"7. It is agreed that Mr. Anderson has been diligent in the performance of his duty.

"8. William R. Gilpin was a resident of the City of Ashland, Boyd County, Kentucky, for more than 20 years prior to his death, and was at the time of his death a resident of the City of Ashland, Boyd County, Kentucky.

(s) Harry Kasfir,
Nichols, Wood, Marx & Ginter,
Counsel for A. M. Anderson,
Receiver, Plaintiff.

(s) R. D. Davis,
Counsel for H. E. Franz,
Executor of the Estate of
William R. Gilpin, Deceased."

On December 14, 1944, the following order was entered:

"This cause coming on for hearing upon the motion of H. E. Franz, Executor of the Estate of William R. Gilpin, Deceased, asking that this cause be dismissed as to the decedent. Thereupon came the plaintiff and moved the Court to revive this action against H. E. Franz, Executor of the Estate of William R. Gilpin,

Deceased, and said personal representative having entered his appearance by his counsel for the purpose of opposing said motion and for no other purpose, and having agreed that the same could be heard on oral motion without further notice of time, and said matter having been submitted to the Court upon an agreed statement of facts, and the Court being advised,

"It is considered, ordered and adjudged that said motion for revivor be, and the same is now overruled, and that this action be, and the same is now dismissed as to the defendant, William R. Gilpin.

"This 14th day of December, 1944.

(s) Mac Swinford, Judge."

On December 15, 1944, the following stipulation was agreed to and on December 20, 1944, the same was noted of record in the United States District Court:

"Judge Marx:

"We move orally that the action against Alexander B. Massey be revived against Henry G. Sandifer, Executor of the Estate of Alexander B. Massey, Deceased.

"STIPULATION

"1. The above motion having been made in open court, notice of the making of such action and of the making of the motion orally is waived, and Henry G. Sandifer, Executor of the Estate of Alexander B. Massey, Deceased, having entered his appearance by his counsel for the purpose of opposing said motion and for no other purpose, and by stipulation of the parties, it is agreed that the same may be heard on the oral motion without further notice or time.

"2. Alexander B. Massey, the defendant, died January 24, 1941.

"3. His will was probated February 17, 1941 and his estate is still open and undistributed.

"4. Revivor is sought by motion against Henry G. Sandifer, Executor of the Estate of Alexander B. Massey, Deceased.

"5. A. M. Anderson, Receiver of the National Bank of Kentucky, did not know of the death of Alexander B. Massey until April 24, 1944, and after the two year period fixed by Rule 25 had expired.

"6. A. M. Anderson, as such Receiver, has brought actions against approximately five thousand defendants, and all told, there were approximately six thousand shareholders of the BancoKentucky Company. These shareholders lived in all parts of the United States and some of them in foreign countries, and during the years that the actions have been in progress many of them have changed their residence from one place to another, and Mr. Anderson has had a limited staff at his disposal, and it has been impracticable and, in fact, impossible to learn of the movements and residences and even the death of defendants, and without such knowledge he could not bring actions for revivor until after he learned of the death.

"7. It is agreed that Mr. Anderson has been diligent in the performance of his duty.

"8. Alexander B. Massey was a resident of the City of Danville, Boyle County, Kentucky, for more than 18 years prior to his death, and was at the time of his death, a resident of the City of Danville, Boyle County, Kentucky.

(s) Harry Kasfir,
Nichols, Wood, Marx & Ginter,
Counsel for A. M. Anderson,
Receiver, Plaintiff.

(s) R. T. Dickerson,
Counsel for Henry G. Sandifer,
Executor of the Estate of Alexander B. Massey, Deceased."

On December 15, 1944, the following order was entered:

"This cause coming on for hearing upon the motion of Henry G. Sandifer, Executor of the Estate of Alexander B. Massey, Deceased, asking that this cause be dismissed as to the decedent. Thereupon came the plaintiff and moved the Court to revive this action against Henry G. Sandifer, Executor of the Estate of Alexander B. Massey, Deceased, and said personal representative having entered his appearance by his counsel for the purpose of opposing said motion and for no other purpose, and having agreed that the same could be heard on oral motion without further notice of time, and said matter having been submitted to the Court upon an agreed statement of facts, and the Court being advised,

"It is considered, ordered and adjudged that said motion for revivor be, and the same is now overruled, and that this action be, and the same is now dismissed as to the defendant, Alexander B. Massey.

"This 15th day of December, 1944.

(s) Mac Swinford, Judge."

On December 18, 1944, the following stipulation was agreed to and the same was left with the United States District Court and filed by order of court December 20, 1944:

"Judge Marx:

"We move orally that the action against Ben Williamson be revived against Ben Williamson, Jr., and Davis Geiger, co-executors of the estate of Ben Williamson, deceased.

"STIPULATION

"1. The above motion having been made in open court, notice of the making of such motion and of the making of the motion orally is waived and Ben Wil-

liamson, Jr. and Davis Geiger, co-executors of the estate of Ben Williamson, deceased, having entered their appearance by their counsel for the purpose of opposing said motion and for no other purposes and by stipulation of the parties, it is agreed that the same may be heard on the oral motion without further notice or time.

"2. Ben Williamson, the defendant, died June 23, 1941.

"3. His will was probated July 28, 1941, and his estate is still open and undistributed.

"4. Revivor is sought by motion against Ben Williamson, Jr. and Davis Geiger, co-executors of the estate of Ben Williamson, deceased.

"5. A. M. Anderson, Receiver of the National Bank of Kentucky, did not know of the death of Ben Williamson until August 10, 1944, and after the two year period fixed by Rule 25 had expired.

"6. A. M. Anderson, as such Receiver, has brought actions against approximately five thousand defendants, and all told there were approximately six thousand shareholders of the BancoKentucky Company. Those shareholders lived in all parts of the United States and some of them in foreign countries, and during the years that the actions have been in progress many of them have changed their residence from one place to another, and Mr. Anderson has had a limited staff at his disposal, and it has been impracticable and, in fact, impossible to learn of the movements and residences and even the death of defendants, and without such knowledge he could not bring actions for revivor until after he learned of the death.

"7. It is agreed that Mr. Anderson has been diligent in the performance of his duty.

"8. Mr. Williamson was a resident of the City of Ashland, Boyd County, Kentucky, for more than forty years prior to his death, and was at the time of his

death a resident of the City of Ashland, Boyd County, Kentucky.

(s) Harry Kasfir,
Nichols, Wood, Marx & Ginter,
Counsel for A. M. Anderson,
Receiver, Plaintiff.
(s) LeWright Browning,
Counsel for Ben Williamson, Jr. and Davis Geiger, co-executors of the estate of Ben Williamson, Deceased."

On December 18, 1944, the following stipulation was agreed to and filed with the Clerk by order of court dated December 20, 1944:

"Judge Marx:

"We move orally that the action against James H. Kitchen be revived against Watt M. Prichard and Charles V. Kitchen, co-executors of the estate of James H. Kitchen, deceased.

"STIPULATION.

"1. The above motion having been made in open court, notice of the making of such action and of the making of the motion orally is waived and Watt M. Prichard and Charles V. Kitchen, co-executors of the estate of James H. Kitchen, deceased, having entered their appearance by their counsel for the purpose of opposing said motion and for no other purposes and by stipulation of the parties, it is agreed that the same may be heard on the oral motion without further notice or time.

"2. James H. Kitchen, the defendant, died October 14, 1941.

"3. His will was probated February 25, 1941 and his estate is still open and undistributed.

"4. Revivor is sought by motion against Watt M. Prichard and Charles V. Kitchen, co-executors of the estate of James H. Kitchen, deceased.

"5. A. M. Anderson, Receiver of the National Bank of Kentucky, did not know of the death of James H. Kitchen until August 10, 1944, and after the two year period fixed by Rule 25 had expired.

"6. A. M. Anderson, as such Receiver, had brought actions against approximately five thousand defendants, and all told there were approximately six thousand shareholders of the BancoKentucky Company. These shareholders lived in all parts of the United States and some of them in foreign countries, and during the years that the actions have been in progress many of them have changed their residence from one place to another, and Mr. Anderson has had a limited staff at his disposal, and it has been impracticable and, in fact, impossible to learn of the movements and residences and even the death of defendants, and without such knowledge he could not bring actions for revivor until after he learned of the death.

"7. It is agreed that Mr. Anderson has been diligent in the performance of his duty.

"8. Mr. Kitchen was a resident of the City of Ashland, Boyd County, Kentucky, for more than forty years prior to his death, and was at the time of his death a resident of the City of Ashland, Boyd County, Kentucky.

(s) Harry Kasfir,
Nichols, Wood, Marx & Ginter,
Counsel for A. M. Anderson,
Receiver, Plaintiff.

(s) LeWright Browning,
Counsel for Watt M. Prichard
and Charles V. Kitchen, co-executors of the estate of James H.
Kitchen, deceased."

On December 20, 1944, the following stipulation was agreed to and filed with the Clerk and noted filed by order of Court dated December 20, 1944:

"Judge Marx:

"We move orally that the action against John W. Kitchen be revived against Catherine C. Kitchen, executrix of the estate of John W. Kitchen, deceased.

"STIPULATION

"1. The above motion having been made in open court, notice of the making of such action and of the making of the motion orally is waived and Catherine C. Kitchen, executrix of the estate of John W. Kitchen, deceased, having entered her appearance by her counsel for the purpose of opposing said motion and for no other purposes and by stipulation of the parties, it is agreed that the same may be heard on the oral motion without further notice or time.

"2. John W. Kitchen, the defendant, died October 18, 1937.

"3. His will was probated October 25, 1937, and his estate is still open and undistributed.

"4. Revivor is sought by motion against Catherine C. Kitchen, executrix of the estate of John W. Kitchen, deceased.

"5. A. M. Anderson, Receiver of the National Bank of Kentucky, did not know of the death of John W. Kitchen until August 10, 1944, and after the two year period fixed by Rule 25 had expired.

"6. A. M. Anderson, as such Receiver, has brought actions against approximately five thousand defendants, and all told there were approximately six thousand shareholders of the BancoKentucky Company. These shareholders lived in all parts of the United States and some of them in foreign countries, and during the years that the actions have been in progress

many of them have changed their residence from one place to another, and Mr. Anderson has had a limited staff at his disposal, and it has been impracticable and, in fact, impossible to learn of the movements and residences and even the death of defendants, and without such knowledge he could not bring actions for revivor until after he learned of the death.

"7. It is agreed that Mr. Anderson has been diligent in the performance of his duty.

"8. Mr. Kitchen was a resident of the City of Ashland, Boyd County, Kentucky, for more than forty years prior to his death, and was at the time of his death a resident of the City of Ashland, Boyd County, Kentucky.

(s) Harry Kasfir,
Nichols, Wood, Marx & Ginter,
Counsel for A. M. Anderson,
Receiver, Plaintiff.

(s) LeWright Browning,
Counsel for Catherine C. Kitchen,
Executrix of the Estate of John
W. Kitchen, Deceased."

On December 18, 1944, the following order was entered:

"This cause coming on for hearing upon the suggestion of record of the deaths of the defendants Ben Williamson, James H. Kitchen, John W. Kitchen, Harry S. Swope, Frances H. Williamson, Rush W. Williamson, J. A. Sparks, Virginia K. Fitch, and John H. McCleary, and thereupon came the plaintiff and moved the court to revive this action against the personal representatives of the defendants, Ben Williamson, James H. Kitchen and John W. Kitchen, and said personal representatives having entered their appearance by their counsel for the purpose of opposing said

motion and for no other purpose, and having agreed that the same could be heard on oral motion without further notice of time, and said matters having been submitted to the court upon an agreed statement of facts, and the court being advised,

"It is considered, ordered and adjudged that said motions for revivor be, and the same are now, overruled, and that this action be, and the same is now, dismissed as to the defendants, Ben Williamson, James H. Kitchen, and John W. Kitchen.

"It is further ordered that this action be, and the same is now, dismissed as to the defendants Harry S. Swope, Frances H. Williamson, Rush W. Williamson, J. A. Sparks, Virginia K. Fitch and John H. McCleary.

"This 18th day of December, 1944.

(s) Mac Swinford, Judge."

On January 1, 1945, the following stipulation was filed:

"Judge Marx:

"We move orally that the action against William K. Massie be revived against Lucy Logan Massie, Executrix of the Estate of William K. Massie, Deceased.

"STIPULATION

"1. The above motion having been made in open court, notice of the making of such action and of the making of the motion orally is waived and Lucy Logan Massie, Executrix of the Estate of William K. Massie, Deceased, having entered her appearance by her counsel for the purpose of opposing said motion and for no other purposes and by stipulation of the parties, it is agreed that the same may be heard on the oral motion without further notice of time.

"2. William K. Massie, the defendant, died November 10, 1941.

"3. His will was probated November 14, 1941, and his estate is still open.

"4. Revivor is sought by motion against Lucy Logan Massie, Executrix of the Estate of William K. Massie, Deceased.

"5. A. M. Anderson, Receiver of the National Bank of Kentucky, did not know of the death of William K. Massie until June 9, 1944, and after the two year period fixed by Rule 25 had expired.

"6. A. M. Anderson, as such Receiver, has brought actions against approximately five thousand defendants, and all told, there were approximately six thousand shareholders of the BancoKentucky Company. These shareholders lived in all parts of the United States and some of them in foreign countries, and during the years that the actions have been in progress many of them have changed their residence from one place to another, and Mr. Anderson has had a limited staff at his disposal, and it has been impracticable and, in fact, impossible to learn of the movements and residences and even the death of defendants, and without such knowledge he could not bring actions for revivor until after he learned of the death.

"7. It is agreed that Mr. Anderson has been diligent in the performance of his duty.

"8. William K. Massie was a resident of the City of Lexington, Fayette County, Kentucky, for more than 50 years prior to his death, and was at the time of his death a resident of the City of Lexington, Fayette County, Kentucky."

(s) Harry Kasfir,
Nichols, Wood, Marx & Ginter,
Counsel for A. M. Anderson,
Receiver, Plaintiff.

(s) J. Ashlin Logan,
Counsel for Lucy Logan Massie,
Executrix of the Estate of William K. Massie, Deceased."

On January 1, 1945, the following order was entered:

"This cause coming on for hearing upon the suggestion of record of the death of the defendant, William K. Massie, thereupon came the plaintiff and moved the Court to revive this action against Lucy Logan Massie, Executrix of the Estate of William K. Massie, Deceased, and said personal representative having entered her appearance by her counsel for the purpose of opposing said motion and for no other purpose, and having agreed that the same could be heard on oral motion without further notice of time, and said matters having been submitted to the Court upon an agreed statement of facts, and the Court being advised,

"It is considered, ordered and adjudged that said motions for revivor be, and the same are now overruled, and that this action be, and the same is now dismissed as to the defendant, William K. Massie.

"This 1st day of January, 1945.

(s) Mac Swinford, Judge."

On March 12, 1945, the following notice of appeal was filed:

"Notice is hereby given that A. M. Anderson, Receiver of The National Bank of Kentucky, an insolvent national banking association, hereby appeals to the United States Circuit Court of Appeals for the Sixth Circuit from the order entered in this action on December 14, 1944, by Honorable Mac Swinford, District Judge, which order denied the motion of the plaintiff for revivor of this action against the defendant, Irvin Yungkau, Executor of the Estate of Albert Yungkau, deceased, and dismissed this action as to the defendant, Albert Yungkau.

"This appeal is taken by direction of the Comp-

troller of the Currency, a department of the Treasury of the United States.

(s) Harry Kasfir,
Nichols, Wood, Marx & Ginter,
Counsel for plaintiff, A. M. Anderson, Receiver, National Bank of Kentucky."

On March 12, 1945, the following notice of appeal was filed:

"Notice is hereby given that A. M. Anderson, Receiver of The National Bank of Kentucky, an insolvent national banking association, hereby appeals to the United States Circuit Court of Appeals for the Sixth Circuit from the order entered in this action on December 15, 1944, by Honorable Mac Swinford, District Judge, which order denied the motion of the plaintiff for revivor of this action against the defendant, Henry G. Sandifer, Executor of the Estate of Alexander B. Massey, deceased, and dismissed this action as to the defendant, Alexander B. Massey.

"This appeal is taken by direction of the Comptroller of the Currency, a department of the Treasury of the United States.

(s) Harry Kasfir,
Nichols, Wood, Marx & Ginter,
Counsel for plaintiff, A. M. Anderson, Receiver, National Bank of Kentucky."

On March 12, 1945, the following notice of appeal was filed:

"Notice is hereby given that A. M. Anderson, Receiver of the National Bank of Kentucky, an insolvent national banking association, hereby appeals

to the United States Circuit Court of Appeals for the Sixth Circuit from the order entered in this action on December 14, 1944, by Honorable Mac Swinford, District Judge, which order denied the motion of the plaintiff for revivor of this action against the defendant, H. E. Franz, Executor of the Estate of William R. Gilpin, deceased, and dismissed this action as to the defendant, William R. Gilpin.

"This appeal is taken by direction of the Comptroller of the Currency, a department of the Treasury of the United States.

(s) Harry Kasfir,
Nichols, Wood, Marx & Ginter,
Counsel for plaintiff, A. M. Anderson, Receiver, National Bank of Kentucky."

On March 12, 1945, the following notice of appeal was filed:

"Notice is hereby given that A. M. Anderson, Receiver of The National Bank of Kentucky, an insolvent national banking association, hereby appeals to the United States Circuit Court of Appeals for the Sixth Circuit from the order entered in this action on December 18, 1944, by Honorable Mac Swinford, District Judge, which order denied the motion of the plaintiff for revivor of this action against the defendant Lucy Logan Massie, Executrix of the Estate of William K. Massie, deceased, and dismissed this action as to the defendant, William K. Massie.

"This appeal is taken by direction of the Comptroller of the Currency, a department of the Treasury of the United States

(s) Harry Kasfir,
Nichols, Wood, Marx & Ginter,
Counsel for plaintiff, A. M. Anderson, Receiver, National Bank of Kentucky."

On March 12, 1945, the following notice of appeal was filed:

"Notice is hereby given that A. M. Anderson, Receiver of the National Bank of Kentucky, an insolvent national banking association, hereby appeals to the United States Circuit Court of Appeals for the Sixth Circuit from the order entered in this action on December 18, 1944, by Honorable Mac Swinford, District Judge, which order denied the motion of the plaintiff for revivor of this action against the defendants, Ben Williamson, Jr. and Davis Geiger, co-executors of the estate of Ben Williamson, deceased, and also denied the motion of the plaintiff for revivor of this action against the defendants, Watt M. Prichard and Charles V. Kitchen, co-executors of the estate of James H. Kitchen, deceased; and also denied the motion of the plaintiff for revivor of this action against the defendant, Catherine C. Kitchen, Executrix of the estate of John W. Kitchen, deceased, and which order further dismissed this action as to the defendants, Ben Williamson, James H. Kitchen, and John W. Kitchen.

"This appeal is taken by direction of the Comptroller of the Currency, a department of the Treasury of the United States.

(s) Harry Kasfir,
Nichols, Wood, Marx & Ginter,
Counsel for plaintiff, A. M. Anderson, Receiver, National Bank of Kentucky."

The following is a statement of points to be relied upon by the appellant upon appeal from the judgments:

"The defendant, A. M. Anderson, hereby relies upon the following points for reversal of the judgments en-

tered herein denying his motions for revivor and dismissing his action:

"1. The Court erred in denying the plaintiff's motion to revive;

"2. The Court erred in dismissing his petition as to the executors of the decedents named in the orders.

(s) Robert S. Marx,
(s) Frank E. Wood,
(s) Harry Kasfir,
Nichols, Wood, Marx & Ginter,
Counsel for A. M. Anderson,
Receiver of the National Bank of Kentucky."

On April 5, 1945, the following order extending time for filing record was entered:

"On application of the plaintiff, it is hereby ordered that the time in which the plaintiff may perfect his appeal from the orders of this Court denying revivors [which orders were entered on December 14, 1944 (Yungkau Estate), December 14, 1944 (Gilpin Estate), December 15, 1944 (Massey Estate), December 18, 1944 (Williamson, James H. Kitchen and John W. Kitchen Estates), and January 1, 1945 (Massie Estate)] by filing a transcript of record in the United States Circuit Court of Appeals for the Sixth Circuit, is hereby extended to and including the 5th day of May, 1945.

(s) Mac Swinford, Judge."

It is further agreed that the appeals taken by the Receiver may be prosecuted on one transcript of record.

It is further agreed that in view of the stipulation as to the record, no further stipulation or designation need be filed and that this shall comprise the record on appeal.

and it is further agreed that the Clerk may certify a copy of this stipulation as the record on appeal.

HARRY KASFIR,
NICHOLS, WOOD, MARX & GINTER,

Counsel for A. M. Anderson, Receiver, National Bank of Kentucky, Plaintiff.

H. R. DYSARD,

Counsel for Irvin Yungkau, Executor of the Estate of Albert Yungkau, Deceased.

R. D. DAVIS,

Counsel for H. E. Franz, Executor of the Estate of William R. Gilpin, Deceased.

J. ASHLIN LOGAN,

Counsel for Lucy Logan Massie, Executrix of the Estate of William K. Massie, Deceased.

LEWRIGHT BROWNING,

Counsel for Ben Williamson, Jr., and Davis Geiger, co-executors of the Estate of Ben Williamson, Deceased; Watt M. Prichard and Charles V. Kitchen, co-executors of the Estate of James H. Kitchen; Catherine C. Kitchen, Executrix of the Estate of John W. Kitchen, Deceased.

HENRY G. SANDIFER,
R. T. DICKERSON,

Counsel for Henry G. Sandifer, Executor of the Estate of Alexander B. Massey, Deceased.

CERTIFICATE OF CLERK

UNITED STATES DISTRICT COURT.
EASTERN DISTRICT OF KENTUCKY,

No. 4081.

I, Arthur B. Rouse, Clerk of the United States District Court for the Eastern District of Kentucky, hereby certify that the foregoing twenty-four pages contains a true, complete and correct transcript of the portions of the record which are included in a stipulation on file in my court, entered into between the parties as a stipulation as to record on appeal.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said court at Covington, Kentucky, in the Eastern District of Kentucky, this 25th day of April, 1945.

A. B. ROUSE,
Clerk.

By MARY M. MCAFEE,
Deputy.

(SEAL)

United States Circuit Court of Appeals

SIXTH CIRCUIT

TRANSCRIPT OF PROCEEDINGS

CAUSE ARGUED AND SUBMITTED—December 4, 1945

(Before: Simons, Allen and Martin, Circuit Judges)

This cause is argued by Robert S. Marx for Appellant and by LeWright Browning for Appellee and is submitted to the Court.

JUDGMENT—Entered January 28, 1946

Appeal from the District Court of the United States for the Eastern District of Kentucky.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Kentucky, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

OPINION—Filed January 28, 1946

OPINION

Decided January 28, 1946.

Before SIMONS, ALLEN and MARTIN, Circuit Judges.

MARTIN, Circuit Judge. The appellant, Receiver of The National Bank of Kentucky, moved in the District Court to revive against the respective executors of seven defendants named in civil actions brought against them, while

alive, to recover stock assessments held lawful in *Anderson* v. *Abbott*, 321 U. S. 349. Each of the appellee executors had previously moved to dismiss the action, against his individual decedent, because not revived within two years after the death of the defendant.

The District Judge sustained the motions of the executors to dismiss and denied the motions of the receiver to revive the actions for the reason that, as he had stated in an earlier case, *Anderson* v. *Brady* (E. D. Ky.), 1 F. R. D. 589, the following language of Civil Procedure Rule 25(a)(1) is a mandatory restriction upon the exercise of discretion to extend the time for revivor beyond the two-year limitation: "If a party dies and the claim is not thereby extinguished, the Court within two years after the death may order substitution of the proper parties. If substitution is not so made, the action shall be dismissed as to the deceased party."

While expressing the opinion that Rule 6(b) serves a most useful purpose in enabling courts to prevent miscarriages of justice, the District Judge, nevertheless, held that the rule does not confer discretion to upset the definite limitation contained in Rule 25(a)(1). The appellant receiver contends that it does. Rule 6(b) provides: "When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period where the failure to act was the result of excusable neglect; but it may not enlarge the period for taking any action under Rule 59, except as stated in subdivision (c) thereof, or the period for taking an appeal as provided by law."

There is no factual controversy presented by this appeal. Indeed, the facts of record are stipulated. It is conceded that each of the seven decedents against whose estates revivors are sought died more than two years prior to the time the bank receiver made his motion to revive. The estates of five of the decedents are "still open and undistributed," the estate of one "is still open," and the estate of the seventh, Albert Yungkau, was "immediately delivered to the beneficiaries of his will."

It is stipulated that in each instance the appellant receiver had no knowledge of the death of the defendant shareholder until "after the two year period fixed by Rule 25 had expired." It is further agreed that the receiver has been diligent in the performance of his duty; that he brought actions against approximately 5,000 of the 6,000 shareholders of Banco-Kentucky Company who lived in all parts of the United States and some even in foreign countries; that many of these shareholders during the progress of the litigation changed their residences; and that with the limited staff at his disposal, it has been "impossible for the receiver to learn of the movements and residences and even the death of defendants, and without such knowledge he could not bring actions for revivor until after he learned of the death."

The appellant urges that Rule 6(b) "permits enlargement" in all cases when by the civil procedure rules an act is required to be done within a specified time, with the two exceptions stated in the rule, namely, the period for taking any action under Rule 59 concerning new trials, and the period for taking an appeal. It is contended that the specification of those two exceptions excludes the "engrafting" of any additional exception upon the rule. Appellant insists that the District Court erred in construing the words "the action shall be dismissed," used in Rule 25(a)(1), as preventing the revivor of the actions after the lapse of two

years from the date of the death of the respective defendants. He points out that the word "shall," though mandatory in character, is not to be so construed in every context. *Escoe* v. *Zerbst*, 295 U. S. 490, 493; *Railroad Company* v. *Hecht*, 95 U. S. 168; *West Wisconsin Railway Co.* v. *Foley*, 94 U. S. 100; *Richbourg Motor Co.* v. *United States*, 281 U. S. 528, 534.

Appellant concedes that "where the only question is the application of Rule 25(a), there is no discretion given the District Court to permit a revivor beyond the two-year period," but that "when the element of excusable neglect comes into play another rule [6(b)] permitting enlargement of time extends the power to the court to exercise his discretion." We do not concur in this interpretation of the rules. In our judgment, Rule 25(a)(1) has the same effect as a statute of limitation with respect to the revival of an action against the estate of a decedent. If an action is not revived within two years following the death of the defendant, a binding duty rests upon the court to dismiss the action. The language of the rule is clearly imperative. Prior to the adoption of Rule 25(a)(1), the period of limitation for reviving an action against the estate of a defendant was fixed by section 778 of the Judicial Code at two years after his death. No purpose is manifested to change the limitation period in the adoption of the civil procedure rule in question. On the contrary, the same limitation is written into the rule. If, within two years after death, substitution of the proper parties has not been made, the rule commands the court to dismiss the action against the deceased party.

"Excusable neglect" to revive an action within a period of definite lawful limitation is no more effective in avoidance of the bar than is the failure to bring an original action within the time limit fixed by statute. The Court is without jurisdiction to excuse "excusable neglect" in either

instance. Rule 25(a)(1) operates both as a statute of limitation upon revivor and as a mandate to the District Court to dismiss an action not seasonably revived by substitution of parties.

Rule 6(b) was not, to our thinking, intended to nullify the mandatory language of Rule 25(a)(1) so as to permit the District Court to enlarge the time within which parties can be substituted for the decedent. The rule would seem to be designed to afford relief to a party whose failure to take timely required steps might be properly classified as "excusable neglect"; but was not intended to apply to affirmative action demanded of the Court in plain words.

No directly applicable authority upon the issue presented has been cited by counsel or revealed by research, but *Wallace* v. *United States*, 142 F. (2d) 240, 244 (C. C. A. 2), bears analogy in principle. In that case, it was held that Civil Procedure Rule 6(b) does not apply to a motion for relief from a judgment or an order on the basis of mistake, inadvertence, surprise, or excusable neglect under Rule 60(b), for the reason that the time for making such motion is expressly limited in that rule to a period not in excess of six months after the entry of the judgment or order. Declaring that interpretative devices such as *expressio unius exclusio alterius* have diminished importance today and must yield to more obvious indications of intention, the opinion states: "The terms of Rule 60(b)—'but in no case exceeding six months'—are so emphatic as to preclude the importation of an exception via Rule 6(b)."

In *Winkelman* v. *General Motors Corporation*, 30 F. Supp. 112 (S. D. N. Y.), it was held that the substitution of a representative of a deceased party pursuant to the Judicial Code, 28 U. S. C. A., Section 778, and to Civil Procedure Rule 25, relating to substitution in the event of the death of a party, is *mandatory*. The District Court, therefore, dismissed the bills of complaint against the decedent and his executors for failure of the plaintiffs to revive the suit within the two-year period provided by law.

A few other cases have been cited which are not considered especially significant here. *Mutual Benefit Health & Accident Ass'n* v. *Snyder*, 109 F. (2d) 469 (C. C. A. 6); *Burke* v. *Canfield*, 111 F. (2d) 526 (D. C. App.); *Ainsworth* v. *Gill Glass & Fixture Co.*, 104 F. (2d) 83 (C. C. A. 3).

Being in our opinion correct, the judgment of the District Court is affirmed.

SIMONS, Circuit Judge (dissenting). With great regret I am unable to lend my concurrence to the opinion of the majority in this case. Rule 25(a) speaks in terms that are seemingly mandatory. Rule 6(b), however, permits the Court to enlarge the period after the expiration of two years "where the failure to act was the result of excusable neglect." The opinion considers it to be conceded that the neglect to reinstate the proceedings was excusable. Had the Rule ended there it would seem to me that the Court would be authorized to entertain a motion for enlargement of the time once excusable neglect had been established. The Rule, however, goes farther and provides exceptions, neither of which refers to Rule 25(a)(1); namely, it may not enlarge the period for taking any action under Rule 59 except as stated in subsection (c) or the period for taking an appeal as provided by law.

It is a well-established rule of statutory construction that where two provisions of a statute are in apparent conflict, the Court must endeavor to reconcile them. It is also a well-established rule that where specific exceptions are stated they exclude all others, and there are persuasive and authoritative adjudications to the effect that though the word "shall" is the language of command it is not controlling but only a "test significant," and the ends and aims of the statute must be consulted. *Essoc* v. *Zerbst*, 295 U. S. 490, 493; *West Wisconsin Railway* v. *Foley*, 94 U. S. 100.

The opinion reasons by analogy that the decision in *Wallace* v. *U. S.*, 142 Fed. (2d) 240; 244 (C. C. A. 2), requires that the word "shall" must, in its present context, be given its mandatory connotation, conceding, however, that that case does not reach the present problem. The *Wallace* case, however, construed Rule 60(b) and not Rule 25(a)(1). The pertinent language in that Rule was "but in no case exceeding six months." This phrase is so emphatic and specific as to preclude "the importation of an exception via Rule 6(b)." This emphasis on the exclusion of exceptions is not present in Rule 25(a)(1). In *Mutual Benefit Health and Accident Ass'n* v. *Snyder*, 109 Fed. (2d) 469 (C. C. A. 6), and *Burke* v. *Canfield*, 111 Fed. (2d) 526 (D. C. App.), excusable neglect was not shown but the Court nevertheless allowed the record to be filed under Rule 75(a), both cases holding that Rule 6(b) did not lift the time limit set down by section 73(g). In *Ainsworth* v. *Gill Glass and Fixture Co.*, 104 Fed. (2d) 83 (C. C. A. 3), it also was not shown that failure to permit a record to be filed was the result of excusable neglect. The Court, however, allowed the record to be filed under Rule 73(a).

Finally, the proposed revision of the rules not yet promulgated includes Rule 25 as an exception to Rule 6(b). This is done on the theory that the limit to substitution should be absolute. This leads me to the conclusion that the proposed revision of the rules contemplates a change in the rule rather than its clarification. I think the judgment should be reversed and the cause remanded for consideration of the plaintiff's suit upon its merits.

CLERK'S CERTIFICATE

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT

I, J. W. Menzies, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of Transcript of Proceedings for Certiorari Application in the case of *A. M. Anderson, Rec.* v. *Irvin Yungkau, Ex., et al.*, No. 10,005, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 26th day of March, A. D. 1946.

Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 13, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Reed and Mr. Justice Jackson took no part in the consideration or decision of this application.

FILE COPY

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FILED
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CHARLES ELMORE CROPLEY

No. 1104 87

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

A. M. ANDERSON, Receiver of National Bank of Kentucky, Louisville, Kentucky,

Petitioner,

v.

IRVIN YUNGKAU, Executor of the Estate of Albert Yungkau, Deceased; H. E. FRANZ, Executor of the Estate of William R. Gilpin, Deceased; LUCY LOGAN MASSIE, Executrix of the Estate of William K. Massie, Deceased; BEN WILLIAMSON, JR. and DAVIS GEIGER, Co-Executors of the Estate of Ben Williamson, Deceased; WATT M. PRICHARD and CHARLES V. KITCHEN, Co-Executors of the Estate of James H. Kitchen, Deceased; CATHERINE C. KITCHEN, Executrix of the Estate of John W. Kitchen, Deceased; HENRY G. SANDIFER, Executor of the Estate of Alexander B. Massey, Deceased,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF FOR PETITIONER

ROBERT S. MARX,
FRANK E. WOOD,
HARRY KASPER,
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Of Counsel:
NICHOLS, WOOD, MARX & GUSTER

THE JOHNSON & HARDIN CO. LAW PRINTERS
CINCINNATI, OHIO

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No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

A. M. ANDERSON, Receiver of National Bank of Kentucky, Louisville, Kentucky,

Petitioner,

v.

IRVIN YUNGKAU, Executor of the Estate of Albert Yungkau, Deceased; H. E. FRANZ, Executor of the Estate of William R. Gilpin, Deceased; LUCY LOGAN MASSIE, Executrix of the Estate of William K. Massie, Deceased; BEN WILLIAMSON, JR. and DAVIS GEIGER, Co-Executors of the Estate of Ben Williamson, Deceased; WATT M. PRICHARD and CHARLES V. KITCHEN, Co-Executors of the Estate of James H. Kitchen, Deceased; CATHERINE C. KITCHEN, Executrix of the Estate of John W. Kitchen, Deceased; HENRY G. SANDIFER, Executor of the Estate of Alexander B. Massey, Deceased,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF FOR PETITIONER

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:—

A. M. Anderson, Receiver of the National Bank of Kentucky, pursuant to the direction and with the approval of the Comptroller of the Currency of the United States, prays that a writ of certiorari issue to review the judg-

ment and order entered January 28, 1946 denying Petitioner's motion for revivor and ordering that the Bill of Complaint of Petitioner against the Respondents be finally dismissed.

SUMMARY STATEMENT

This case presents an important question of Federal Law and Practice which has not been, but should be settled, by this Court [Rule 38(b)]. It involves the interpretation and reconciliation of Rule 25(a) and Rule 6(b) of the Federal Rules of Civil Procedure. No question of fact is involved. The entire Record is covered by a short stipulation.

Seven cases are directly presented. The question in each case is the same and the cases are consolidated for convenience. The cases all stem from the Bill of Complaint filed by the Petitioner in the Eastern District of Kentucky, to recover the stock assessment for which Respondents (then living—since deceased) were held liable by this Court in *Anderson* v. *Abbott* (1944), 321 U. S. 349. However, identical actions were filed by the Petitioner in other circuits and similar questions to those involved here exist in other cases. The determination of such questions in other actions await the outcome of the present suits which are test or type cases.

The sole issue in each case is whether the District Court has power to revive an action against a deceased defendant after the two year period provided in Rule 25(a), upon motion of Petitioner, filed under Rule 6(b) and affirmative and satisfactory proof that failure to revive within two years was due to "excusable neglect." The Court below held that Rule 25(a) was mandatory and that the Court was without any discretion to enlarge the two year limitation, notwithstanding the specific provisions of Rule 6(b) permitting "the act to be done after the expiration of the

specified period when the failure to act was the result of excusable neglect."

The agreed facts may be simply stated. The defendants were living when the action was brought in the District Court and were served with process.

During the pendency of *Anderson* v. *Abbott*, 321 U. S. 349, in the Western District of Kentucky, the cases in the Eastern District and all other Districts in the United States were stayed by agreement—with the understanding that they would be governed by the decision of this Court in the *Abbott* case. In the interim the defendants herein died and Respondents were appointed to administer their estates. The Petitioner, through no lack of diligence, did not learn of defendants' death until more than two years thereafter. Promptly upon learning of defendant's death, and before the estate had been closed, Petitioner moved to revive the case against defendant's Executor or Administrator. This motion was supported by adequate proof under Rule 6(b) to warrant the granting of the motion, if the Court had power to exercise discretion. However, the Court held it was barred from the exercise of any discretion under Rule 25(a), denied Petitioner's motion and dismissed the Bill of Complaint.

The "Stipulation" in the case against Ben Williamson, Jr. and Davis Geiger, Co-Executors of the Estate of Ben Williamson, Deceased (R. 11), is typical of similar stipulations in the cases against Yungkau (R. 57), Franz (R. 7), Massie (R. 17), Massey (R. 9) and Kitchen (R. 13-15).

Suit was filed February 18, 1936 (R. 11). The allegations were "identical" to the allegations in the suit filed in the Western District, decided "in favor of the Receiver in the case of *Anderson* v. *Abbott*, 321 U. S. 349" (R. 2). Ben Williamson died June 23, 1941 (R. 12). His will was probated July 28, 1941, and "*his estate is still open and undistributed*" (R. 12). *Petitioner did not know of his death*

"until August 10, 1944, after the two year period fixed by Rule 25 had expired" (R. 12).

Petitioner had *actions pending* against "approximately *5000 defendants*" (R. 12). There were 6000 shareholders of Banco-Kentucky Company living in all parts of the United States and abroad. Their addresses changed. The Receiver's staff was necessarily limited and it was "impracticable" and *"in fact impossible"* to learn of the residences, movements and even *the death of defendants."* "Without such knowledge he could not bring actions for revivor until after he learned of the death" (R. 12).

It was further agreed that the petitioner *"has been diligent in the performance of his duty."*

Upon the above agreed facts the Court is asked to determine whether the District Court was correct in deciding that it was powerless under Rule 6(b) to relieve against the "miscarriage of justice," which results from the claimed inability to extend the two year "period" of Rule 25(a).

OPINION BELOW

The District Court for the Eastern District filed no opinion. He relied upon his former opinion in *Anderson* v. *Brady*, 1 F. R. D. 589. The opinion of the Sixth Circuit Court of Appeals affirming the judgment of the District Court (R. 26) and the dissenting opinion of Judge Simons (R. 31) are not yet reported. The order of affirmance was entered January 28, 1946 (R. 26).

JURISDICTION

Jurisdiction is conferred on this Court to review this cause by writ of certiorari by Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C., Title 28, Sec. 347).

THE QUESTION PRESENTED

The legal question presented is whether the period of two years specified for revivor in Rule 25(a) is absolutely final regardless of the circumstances or whether the Court has power under Rule 6(b) to permit Revivor after the specified period, "when the failure to act" (within the period) was the "result of excusable neglect."

In other words, does Rule 6(b) mean what it plainly states: "when by these Rules . . . an act is required . . . to be done within a specified time, the Court *for cause shown* may, at any time in its discretion . . . (2) upon motion *permit the act to be done after the expiration of the specified period when the failure to act was the result of excusable neglect,*" or was the Court below correct in reading into the Rule a *third* exception in addition to the only two specific exceptions permitted by the Rule? This Court has never passed on this question.

REASONS RELIED ON FOR WRIT OF CERTIORARI

The decision of the Court below is without precedent. It decides an important question of Federal Law and Practice which has not been, but should be, decided by this Court. The question involves the proper interpretation of the Federal Rules of Civil Procedure and the reconciliation of a conflict between two Rules.

The question involved is not only of importance in the seven cases herein presented but will arise in similar cases pending in other circuits. Further, the question of the Right to Revive after the two year period specified in Rule 25(a) when *good cause is shown for failure to act within the period* is a general question which is involved in numerous cases in the Federal Courts and can only be settled by the authoritative decision of this Court. The question is therefore of broad general interest.

The decision below is contrary to the modern view that Courts should have the power, upon proper showing, to relieve against hardship and to prevent a miscarriage of justice. Rule 6(b) was obviously intended to accomplish this advance in modern procedure over the antiquated and harsh rules of former days. Rule 6(b) was intended to vest power in the District Court to extend the specific period for an act where, as here, it is established that it was "*in fact impossible*" to act within the period required by other Rules.

It is also apparent that the interpretation of Rule 6(b) by the Sixth Circuit is at variance with the interpretation of that rule in its present form by the Advisory Committee on Rules for Civil Procedure of this Court. There is also a conflict between circuits relative to the application of Rule 6(b) on the time for filing a record on appeal fixed by Rule 73(g). *Ainsworth* v. *Gill Glass & Fixture Co.* (C. C. A. 3), 104 F. (2d) 83, holds that Rule 6(b) can be invoked to extend the time. *Burke* v. *Canfield, et al.* (C. C. A., D. C.), 111 Fed. Rep. (2d) 526 and *Mutual Benefit Health & Accident Ass'n* v. *Snyder* (C. C. A. 6), 109 F. (2d) 469, hold directly contra.

SPECIFICATIONS OF ERROR

1. The Circuit Court of Appeals erred in affirming the decision of the District Court.

2. The Circuit Court of Appeals erred in holding that the District Court had no discretion to extend the time for Revivor, notwithstanding "good cause" and "excusable neglect" were proved under Rule 6(b).

ARGUMENT

("Opinion Below," "Jurisdiction" and "Statement of the Case" Are Set Forth in the Petition.)

It would seem that this is peculiarly a case for the exercise of this Court's power of supervision and review. It

involves a conflict between the Rules of Federal Procedure which has been resolved differently by inferior courts. This Court alone can settle the question and reconcile the conflict.

The question is one of general interest and concern. It is not only involved in a number of cases in the Banco litigation, pending in different circuits, but is common to all classes of action involving individual parties. Further, the question is presented on a clear cut and agreed record so that it can be determined free from the complication of any controversial facts.

While it is not appropriate at this posture of the case to argue the merits, it may not be amiss to point out that decision of the majority in the Court below does violence to the plain language and intent of Rule 6(b) and is contrary to the interpretation of the Rule by this Court's Advisory Committee on the Rules.

Rule 6(b) plainly provides—

> "When by these rules . . . an act is required . . . to be done at or within a specified time, the court for *cause shown* may, at any time in *its discretion* . . . (2) upon motion permit the act to be done *after the expiration of the specified period* where the failure to act was the result of *excusable* neglect; *but it may not* enlarge the period for taking any action under Rule 59, except as stated in subdivision (c) thereof, or the *period for taking an appeal* as provided by law."

There are no other exceptions. Neither of these exceptions is involved here. The Court below was without authority to alter the Rules or add a third exception with respect to Rule 25(a). Any change in Rule 6(b) must be made by this Court which alone has power to change the rule or increase the number of exceptions thereto. This is recognized in the "Second Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the District

Courts of the United States" prepared by the Advisory Committee on Rules for Civil Procedure (May, 1945). The learned committee does propose a change in Rule 6(b) so as to add several additional exceptions including 25(a). However, the committee is careful to state "This draft has not been approved by the Supreme Court . . . the Court . . . has not given it consideration (May 15, 1945)".

"Substitution of Parties" or Revivor after Death under Rule 25(a) is clearly "an act" "required to be done at or within a specified time" "by these rules." Therefore, the Court for "cause shown" has "discretion" to permit the substitution of Parties after the two year period upon proof of "excusable" neglect under Rule 6(b).

This Court's Advisory Committee on Rules for Civil Procedure has expressed its view that Rule 6(b) contains only two exceptions as follows:—

> "Rule 6(b) is a rule of general application giving wide discretion to the court to enlarge these time limits or revive them after they have expired, *the only exceptions* stated in the rule being a prohibition against enlarging the time specified in Rule 59(b) to (d) for making motions for or granting new trials and a prohibition against enlarging the time fixed by law for taking an appeal." (Italics added).[1]
>
> *"Some of the present rules which contain time limits which may be set aside under Rule 6(b) are Rule 25 allowing substitution of parties, in case of death within two years, . . ."*

To the same effect see Address of Dean Charles E. Clark [Federal Rules of Civil Procedure and Proceedings to the American Bar Association Institute at Cleveland (1938) at p. 210].

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[1] Second Preliminary Draft of Proposed Amendments Note, p. 2.

The reason given below for making Rule 25a an additional exception was the requirement of the rule that if the act of substitution was not done in two years the action "*shall*" be dismissed. However, the word "shall" when used with reference to courts or governmental action is not always absolute and imperative. See *Escoe* v. *Zerbst, Warden,* 295 U. S. 490; *Railroad Company* v. *Hecht,* 95 U. S. 168; *West Wisconsin Railway Co.* v. *Foley,* 94 U. S. 100; *Richbourg Motor Co.* v. *United States,* 281 U. S. 528, 534; *Munro* v. *State,* 223 N. Y. 208; *Swift* v. *Registrars,* 281 Mass. 271.

Various acts required to be done by the rules within specified periods carry mandatory consequences if not done on time. However, this mandatory language must be read in connection with the rules as a whole. When so read it is clear that Rule 6(b) was intended to relieve against the injustice and the hardship of an unyielding application of the executioner's knife when compliance with the time limit was "impossible" and "cause" and "excusable neglect" are established.

This interpretation is in accordance with the intent of the new Rules to liberalize procedure, mitigate the harshness of the old rules and to prevent a miscarriage of justice. The interpretation of the District Court would prevent revivor after two years under any circumstances, including cases where the fact of death was concealed from the opposite party until the "period" provided by Rule 25(a) had expired. Other illustrations of the necessity for applying Rule 6(b) are cases where due to service in the Armed Forces during the War, death is not known or reported until after the two year period of Rule 25(a) has expired.

The conflict between circuits as to whether the time limit of forty days to file record on appeal under Rule 73(g) may

be extended in accordance with Rule 6(b) did not reach this court because in all three of the cases the court exercised its "discretion" under Paragraph (a) of Rule 73[2] to retain jurisdiction of the appeal, notwithstanding failure to file the record on time.

Nor could the question reach this Court in *Winkelman* v. *General Motors Corp.*, 30 Fed. Supp. 112, or in *Anderson* v. *Brady*, 1 F. R. D. 589, because in neither case was there a finding of "excusable neglect" which is a prerequisite for the exercise of this Court's discretion under Rule 6(b).

CONCLUSION

This Court has not heretofore had the question at bar directly presented and we respectfully pray that the Petition for a writ of certiorari be granted.

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---

[2] *Ainsworth* v. *Gill Glass & Fixture Co.* (C. C. A. 3), 104 F. (2d) 83; *Burke* v. *Canfield* (C. C. A., D. C.), 111 Fed. (2d) 526; *Mutual Benefit Health & Accident Assn.* v. *Snyder* (C. C. A. 6), 109 Fed. (2d) 469.

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MAY 9 1946
CHARLES ELMORE CROPLEY

No. 1104

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

A. M. ANDERSON, Receiver of National Bank of Kentucky, Louisville, Kentucky,

Petitioner,

v.

IRVIN YUNGKAU, Executor of the Estate of Albert Yungkau, Deceased; H. E. FRANZ, Executor of the Estate of William R. Gilpin, Deceased; LUCY LOGAN MASSIE, Executrix of the Estate of William K. Massie, Deceased; BEN WILLIAMSON, JR. and DAVIS GEIGER, Co-Executors of the Estate of Ben Williamson, Deceased; WATT M. PRICHARD and CHARLES V. KITCHEN, Co-Executors of the Estate of James H. Kitchen, Deceased; CATHERINE C. KITCHEN, Executrix of the Estate of John W. Kitchen, Deceased; HENRY G. SANDIFER, Executor of the Estate of Alexander B. Massey, Deceased,

Respondents.

REPLY BRIEF FOR PETITIONER

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Respondents.

REPLY BRIEF FOR PETITIONER

The briefs for respondents refer to the second preliminary draft of recommendations by this Court's Advisory Committee on rules for civil procedure. Respondent Ben Williamson, executor, on page four of his brief quotes a sentence from that preliminary draft to the effect that,

"as to Rule 25 . . . the limit there fixed should be absolute."

The same quotation recognizes that as now drawn "finality is not involved" in Rule 25.

It is unfortunate that neither petitioner nor respondents have available the final report of the Advisory Committee. The Committee met on March 25, 1946 and counsel for petitioner is informed that it arrived at a final conclusion as to amendments to the rules which will be submitted to this Court. Counsel for petitioner is further informed that one of those recommendations will be for a clarification of the rules to permit revivor beyond the two-year period in a proper case on a showing of excusable neglect. The promulgation of such an amendment would in the future produce with clarity and certainty, the effect for which petitioner contended in the lower court. If adopted the result would be that every litigant will be able to obtain the relief which the Circuit Court of Appeals denied the Receiver in this case. Although the proposed amendment clarifies the rule, the present rule should receive a liberal construction and so construed we submit that the rule permits substitution of the parties in the present case.

CONCLUSION

We therefore urge that the petition should be granted so that the Court may construe the rule in the present case and for future guidance in connection with the Advisory Committee's final recommendation.

Respectfully submitted,

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. [redacted] 87.

A. M. ANDERSON, RECEIVER OF NATIONAL BANK OF KENTUCKY,

Petitioner,

vs.

IRVIN YUNGKAU, EXECUTOR OF THE ESTATE OF ALBERT YUNGKAU, DECEASED, ET AL.,

Respondents

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Although the proposed amendment clarifies the rule the present rule should receive a liberal consideration, and so construed, we submit, the rule permits substitution of the parties in the present case.

Conclusion

We therefore urge that the petition should be granted so that the court may construe the rule in the present case and for future guidance in connection with the Advisory Committee's final recommendations.

Respectfully submitted,

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No. 87

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

A. M. ANDERSON, Receiver of National Bank of Kentucky, Louisville, Kentucky,

Petitioner,

v.

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Respondents.

BRIEF FOR PETITIONER

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OCTOBER TERM, 1946

A. M. ANDERSON, Receiver of National Bank of Kentucky, Louisville, Kentucky,

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v.

IRVIN YUNGKAU, Executor of the Estate of Albert Yungkau, deceased, et al.,

Respondents.

BRIEF FOR PETITIONER

OPINIONS BELOW

The District Judge for the Eastern District of Kentucky filed no opinion. He relied upon his former opinion in *Anderson* v. *Brady, et al.* (1941), 1 F. R. D. 589. The opinion of the United States Circuit Court of Appeals for the Sixth Circuit affirming the judgment of the District Court (R. 26) and the dissenting opinion of Judge Simons (R. 31) are reported in 153 F. (2d) 685. The order of affirmance was entered January 28, 1946 (R. 26). This Court granted certiorari and ordered the case transferred to the summary docket by order entered May 13, 1946 (14 U. S. Law Week 3405).

CONCISE STATEMENT OF JURISDICTION

Jurisdiction is conferred on this Court to review this cause by Writ of Certiorari by Section 40(a) of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C. Title 28, § 347). As noted above, this Court granted certiorari May 13, 1946.

STATEMENT OF THE CASE

This case presents an important question of federal law and practice which has not been, but should be, settled by this Court.[1] It involves the interpretation and reconciliation of Rule 25(a)[2] and Rule 6(b)[3] of the Rules of Civil Procedure for the District Courts of the United States, adopted by this Court pursuant to the Act of June 19, 1934, Chapter 651.

No question of fact is involved (R. 28). The entire record is covered by short stipulations.

---

[1] Sec. 5(b) of Rule 38 of the Revised Rules of the Supreme Court of the United States.

[2] Rule 25. Substitution of Parties. (a) Death. (1) If a party dies and the claim is not thereby extinguished, the court within two years after the death may order substitution of the proper parties. If substitution is not so made, the action shall be dismissed as to the deceased party. The motion for substitution may be made by the successors or representatives of the deceased party or by any party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district. (2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

[3] Rule 6. Time. . . . (b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period where the failure to act was the result of excusable neglect; but it may not enlarge the period for taking any action under Rule 59, except as stated in subdivision (c) thereof, or the period for taking an appeal as provided by law.

This case involves the estates of seven individuals who were among the defendants in an action brought to collect a stock assessment. These defendants died while the suit was pending. The sole issue in each case is whether the district court has power to revive an action against a deceased defendant after the two year period provided in Rule 25(a), upon motion of petitioner filed under Rule 6(b) and a showing of affirmative and satisfactory proof that failure to revive within two years was due to "excusable neglect." The court below held that the two year period prescribed in Rule 25(a) was mandatory and that the district court was without any discretion to act after the expiration of the period notwithstanding the specific provisions of Rule 6(b) providing that "when by these rules . . . an act is *required* or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion . . . (2) upon motion permit the act to be done *after the expiration of the specified period* when the failure to act was the result of excusable neglect. . . ." (Emphasis supplied.)

In other words, the question is whether Rule 6(b) means exactly what it says. Under Rule 25(a), if a party dies, it is provided that upon motion the court may order substitution of the proper parties "within two years after the death." Rule 6(b) permits an act to be done after the expiration of the specified period for cause shown when the failure to act was the result of excusable neglect. By its language ("When by these rules . . .") Rule 6(b) appears to apply to *all* rules with but two specific exceptions which are not applicable here. The effect of the holding of the courts below was to incorporate in Rule 6(b) a third exception to the discretionary powers of the district court to act under the broad powers of this rule.

SPECIFICATIONS OF ERROR

1. The Circuit Court of Appeals erred in affirming the decision of the District Court.

2. The Circuit Court of Appeals erred in holding that the District Court had no discretion to extend the time for revivor, notwithstanding proof of "good cause" and "excusable neglect" under Rule 6(b).

ARGUMENT

The cases at bar all stem from the bill of complaint filed by the petitioner on February 16, 1936, in the Eastern District of Kentucky to recover stock assessments from shareholders of the BancoKentucky Company (R. 1). The allegations of the petition were identical to the allegations filed in the case of *Anderson* v. *Abbott, et al.*, in the Western District of Kentucky and in the petition filed in other districts throughout the United States (R. 1). *Anderson* v. *Abbott* was the principal case upon which all of the others depended, and during the course of time which it took to bring that case up for final decision of this Court, the cases at bar in the Eastern District of Kentucky and other districts in the United States were stayed by agreement with the understanding that they would be governed by the decision in this Court of the *Abbott* case.

This Court decided *Anderson* v. *Abbott, et al.*, March 6, 1944 and sustained the liability of the shareholders of BancoKentucky for the stock assessment (321 U. S. 349), and denied a rehearing on April 3, 1944 (321 U. S. 804).

During the time that *Anderson* v. *Abbott* was being litigated, the BancoKentucky shareholders involved in these actions died and the respondents were appointed to administer their estates (R. 5, 7, 10, 12, 14, 15, 18). The petitioner, through no lack of diligence, did not learn of the death of these shareholders until more than two years after the deaths had occurred (R. 5, 7, 10, 12, 14, 15, 18). Promptly upon learning of the death of these shareholders petitioner moved to revive the cases against the representa-

tives of the decedents (R. 5, 7, 9, 11, 13, 15, 17). The motions for substitutions of the representatives of the decedents were supported by adequate proof under Rule 6(b) to warrant the granting of the substitution if the district court had power to exercise discretion (See Stipulations, R. 5, 7, 9, 11, 13, 15, 17). However, in each case the District Judge held that he was barred by Rule 25(a) from exercising any discretionary powers, denied the motions for revivor, and dismissed the bill of complaint.

The record contains a stipulation for each of the seven cases at bar (R. 5, 7, 9, 11, 13, 15, 17). As to the decedents, William R. Gilpin (R. 7), Alexander B. Massey (R. 10), Ben Williamson (R. 12), James H. Kitchen (R. 13), and William K. Massie (R. 18), it is stipulated that the estates are still open and undistributed. As to the decedent, Albert Yungkau, it is stipulated that he died July 19, 1941, "his will was probated July 28, 1941, and his estate was immediately delivered to the beneficiaries of his will" (R. 5).

In all seven cases it is stipulated that the petitioner, A. M. Anderson, Receiver of the National Bank of Kentucky, did not know of the death until more than two years had expired (R. 5, 7, 10, 12, 14, 15, 18).

In each case the record contains the stipulation that Anderson, as Receiver, brought actions against approximately 5000 defendants and that there were, all told, approximately 6000 shareholders of the National Bank of Kentucky and "these shareholders lived in all parts of the United States and some of them in foreign countries, and during the years that the actions have been in progress many of them have changed their residence from one place to another" (R. 5, 7-8, 10, 12, 14, 15-16, 18). It was further stipulated in each case that Mr. Anderson has had a limited staff at his disposal and "it has been impracticable and, *in fact, impossible* to learn of the movements and residences and even the death of defendants . . ." (R. 5, 8, 10, 12, 14,

15, 18, emphasis supplied). It was agreed that without such knowledge Anderson "could not bring actions for revivor until after he learned of the death" (R. 6, 8, 10, 12, 14, 16, 18). It was further agreed that Anderson "has been diligent in the performance of his duty" (R. 6, 8, 10, 12, 14, 16, 18).

No argument needs to be added in support of the stipulations that the Receiver at all times has been diligent in the performance of his duty. With over 6000 stockholders of BancoKentucky and actions brought against approximately 5000 of them, it was, as is specifically stipulated, in fact impossible to learn of the movements and residences and even the death of defendants. Even if the war had not resulted in abnormal movements and changes of residences, the task of keeping track of the approximately 5000 defendants would have been beyond the capacity of the limited facilities of the receivership. The incidence of the war made it impossible to follow the movements and deaths of the shareholders of BancoKentucky scattered throughout the United States and foreign countries.

Even with this clear and stipulated showing of a reasonable excuse for failure to apply for substitution within two years after the death of decedents, the District Judge held that he was powerless to permit substitution after the expiration of the two year period. In so holding, he relied upon his decision in *Anderson* v. *Brady, et al.* (1941), 1 F. R. D. 589, in which he ruled that Rule 6(b) did not apply when the two year period provided in Rule 25(a) had expired. A similar ruling was made in *Winkleman et al.* v. *General Motors Corporation, et al.* (1939), 30 F. Supp. 112, cited below, but there the District Judge found that the death was known to the opposing party within the two year period, so that "excusable neglect," within the meaning of Rule 6(b) was not shown to exist. In the cases at bar, however, the District Judge held in effect that not-

withstanding the fact that "excusable neglect" was shown, that substitution was not permitted after the two year period prescribed by Rule 25(a).

In its "Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States" the notes of the Advisory Committee to Rules 6 and 25 contain such a thorough analysis of the decisions of the courts under these rules that anything we might add would be cumulative (Report pp. 2-6, 32). However, in passing, we think it pertinent that the Advisory Committee noted that Rule 6(b) could be interpreted to be of general application to all rules and court orders other than the specific exceptions contained in the rule itself, the Committee's note to subdivision 6(b) stating in part:

> "Rule 6(b) is a rule of general application giving wide discretion to the court to enlarge these time limits or revive them after they have expired, the only exceptions stated in the original rule being a prohibition against enlarging the time specified in Rule 59(b) and (d) for making motions for or granting new trials, and a prohibition against enlarging the time fixed by law for taking an appeal. It should also be noted that Rule 6(b) itself contains no limitation of time within which the court may exercise its discretion, and since the expiration of the term does not end its power, there is now no time limit on the exercise of its discretion under Rule 6(b)."

> "Decisions of lower federal courts suggest that some of the rules containing time limits which may be set aside under Rule 6(b) are Rules 25, 50(b), 52(b), 60(b) and 73(g)."

> "In a number of cases the effect of Rule 6(b) on the time limitations of these rules has been considered. *Certainly the rule is susceptible of the interpretation that the court is given the power in its discretion*

> *to relieve a party from failure to act within the times specified in any of these other rules, with only the exceptions stated in Rule 6(b),* and in some cases the rule has been so construed." (Report of Proposed Amendments, pages 2-3, emphasis supplied).

Although there are several decisions referred to in the notes of the Advisory Committee to Rule 6(b), all of them are decisions of the lower courts except this Court's ruling in *Leishman* v. *Associated Wholesale Electric Co.* (1943), 318 U. S. 203, which recognized that "... Rule 6(b) allowed the district court to enlarge the time to make a motion for amending findings and judgment beyond the limit expressly fixed in Rule 52(b)" (Report of the Advisory Committee, supra, p. 3). That case also recognized that Rule 6(b) meant exactly what it said when it specifically excepted the enlargement of the time for motions for or granting new trial (318 U. S. 203, 206).

There was nothing in the presentation of Rule 6(b) to the bar or to the Congress to indicate that there were any exceptions to Rule 6(b) other than the two specific exceptions set forth in the rule. In an address given during the proceedings of the American Bar Association Institute at Cleveland in 1938, Dean Charles E. Clark, a member and reporter of the Advisory Committee said:

> "We have divided the rule (6[b]) into two parts, and there is rather an important difference between the two. The first is when the application is made before the time limit has already arrived, before the given time limit has expired, and there it is provided that the court may at any time, with or without motion or notice, order the period enlarged."
>
> "The second provision is one covering a case where the time has already gone by, and here it is restricted to be done only on motion, but the court may still per-

mit the act to be done after the expiration of the specified period where the failure to act was the result of excusable neglect, *with two exceptions*. The two exceptions are Rule 59, which deals with motions for new trial, and the period for taking an appeal, which of course, is governed by statutory law" (See Federal Rules of Civil Procedure and Proceedings of the American Bar Association Institute at Cleveland in 1938, p. 210, emphasis supplied).

Likewise when the rules were discussed before the Committee of the Judiciary of the House of Representatives prior to the time that they were to become effective, Edgar B. Tolman, a member of the Advisory Committee, after reading Rule 6(b) to the Committee, said:

"There are many cases that have gone wrong because the time prescribed for an appearance or for filing a pleading or a motion has expired. The apprehension that every lawyer entertains of getting caught without knowledge of a rule or service of summons or notices is here removed because the court, in its discretion, even after the time has gone by, may do this, thus preventing many miscarriages of justice" (Hearings before the Committee on the Judiciary, House of Representatives, 75th Congress, Third Session, p. 90).

It would appear from this that if Congress or the Advisory Committee contemplated that there were exceptions to Rule 6(b), other than the two incorporated in the rule itself, there is no indication of it.

Nevertheless, the District Judge and two of the judges of the Court of Appeals felt that the language of Rule 25 (a): "If substitution is not so made, the action *shall* be dismissed as to the deceased party" (emphasis supplied) was a mandatory restriction which precluded the court's exercise of discretion under Rule 6(b), and, in effect, en-

grafted an additional exception to Rule 6(b). Judge Simons of the Court of Appeals, however, felt that although Rule 25(a) "speaks in terms that are seemingly mandatory," Rule 6(b) "permits the Court to enlarge the period after the expiration of two years 'where the failure to act was the result of excusable neglect' " (R. 21). Noting that the opinion of the majority of the Court ". . . considers it to be conceded that the neglect to reinstate the proceedings was excusable," Judge Simons thought that the statement of the specific exceptions to Rule 6(b) indicated that the use of the word "shall" in Rule 25(a) was not a mandatory restriction (153 F. [2d] 685, 688; R. 31).

We think that the reasoning of Judge Simons is sound. As this Court has indicated on a number of occasions, the use of the word "shall" is not always absolute and imperative. See *Escoe* v. *Zerbst*, Warden (1935), 295 U. S. 490; *Railway Company* v. *Hecht* (1877), 95 U. S. 168; *West Wisconsin Railway Co.* v. *Foley* (1876), 94 U. S. 100; *Richbourg Motor Co.* v. *United States* (1930), 281 U. S. 528, 534.

The language of rules other than Rule 25(a) appear to be mandatory, but it has been held that such language is not to be so construed when considered in connection with the discretionary power granted by Rule 6(b). Thus, Rule 12(a) provides that "a defendant *shall* serve his answer within thirty days . . . ," but it has been held that the time may be enlarged under Rule 6(b). *Blanton* v. *Pacific Mutual Life Insurance Co.* (1944), 4 F. R. D. 200. See also *Ainsworth* v. *Gill Glass & Fixture Co.* (C. C. A. 3, 1939), 104 F. (2d) 83.

Various acts required to be done by the rules within specified periods apparently carry mandatory consequences if not done on time. However, such mandatory language cannot be read without reference to the rules as a whole. When so read it is clear that Rule 6(b) was intended to relieve against the injustice and the hardship of an un-

yielding application of the executioner's knife when compliance with the time limit was "impossible" and "cause" and "excusable neglect" are established.

This interpretation is in accordance with the intent of the new rules to liberalize procedure, mitigate the harshness of the old rules and to prevent a miscarriage of justice, as Major Tolman so clearly stated when he was discussing this rule before the Judiciary Committee of the House of Representatives of the 75th Congress. The interpretation of the District Court would prevent revivor after two years under any circumstances, including cases where the fact of death was concealed from the opposite party until the period provided by Rule 25(a) had expired.[4]

Certainly the cases at bar demonstrate the wisdom and need for a broad application of Rule 6(b). With approximately 6000 shareholders of BancoKentucky scattered throughout the United States and foreign countries and approximately 5000 defendants in courts throughout the country awaiting the decision in the *Abbott* case, it was in fact and was so stipulated, impossible to learn of the changes of residences and the deaths of all of the shareholders. This is particularly so where, as here, after the actions had been filed *and service obtained* (R. 2) and before the final decision in the *Abbott* case, the country was plunged into a war which resulted in abnormal movements of a large sector of the population and frequently deaths could not be known and were not reported until after the two year period had expired.

Thus, wholly aside from the proposed amendments to Rules 6(b) and 25(a), the rules as they now stand do not indicate an intention to limit the discretionary powers of the district courts to act in the interest of justice where a period provided by one of the rules (other than the two specific exceptions) has expired. To interpret the rules

[4] Cf. *Holmberg et al.* v. *Armbrecht* (1945), 327 U. S. 392, where the fact of stock ownership was concealed.

otherwise would prevent the court from ordering substitution in any case in which the death of a party was wilfully concealed by the representatives. The situation in these cases presents as clear proof of good cause for the court to exercise the discretionary powers provided by Rule 6(b) as a case of deliberate concealment.

The effect of the proposed amendments to Rules 6(b) and 25(a) is specifically to carry over into Rule 25(a) the discretion to act after the expiration of the two year period upon a showing of a reasonable excuse for failure to apply within that period which is provided generally by the present Rule 6(b), and to resolve the ambiguity that was imported into the rule by the decision of the lower courts in this case. The Advisory Committee recognized the need for the exercise of discretion in its note to the amendment proposed for Rule 25, where it said:

> "This amendment guards against possible injustice in a case where there is some reasonable excuse for not applying for substitution within the two year period."

If this Court should affirm the decision in this case and later adopt the proposed clarifying amendments to the rules, the effect will be to deny to the Receiver the right to obtain substitution under circumstances in which substitution will not in the future be denied to other litigants.

CONCLUSION

It is respectfully submitted that the decision of the court below should be reversed.

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No. 87

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

A. M. ANDERSON, Receiver of National Bank of Kentucky, Louisville, Kentucky,

Petitioner,

v.

IRVIN YUNGKAU, Executor of the Estate of Albert Yungkau, deceased; H. E. FRANTZ, Executor of the Estate of William R. Gilpin, deceased; LUCY LOGAN MASSIE, Executrix of the Estate of William K. Massie, deceased; BEN WILLIAMSON, JR., and DAVIS GEIGER, Co-Executors of the Estate of Ben Williamson, deceased; WATT M. PRICHARD and CHARLES V. KITCHEN, Co-Executors of the Estate of James H. Kitchen, deceased; CATHERINE C. KITCHEN, Executrix of the Estate of John W. Kitchen, deceased; HENRY SANDIFER, Executor of the Estate of Alexander B. Massey, deceased,

Respondents.

REPLY BRIEF FOR PETITIONER

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Respondents.

REPLY BRIEF FOR PETITIONER

Because two of the briefs for the respondents raise in this court for the first time a question which was not presented in the briefs or arguments made in the lower courts, this brief is submitted to meet this entirely new issue. The question is raised specifically as the second point in the brief submitted by Mr. LeWright Browning, counsel for the respondents, Ben Williamson, Jr. and Davis Gei-

ger, co-executors, et al., and is the principal issue argued in a separate brief submitted on behalf of the respondent, Henry G. Sandifer, executor of the estate of Alexander B. Massey.

In substance this new issue, raised in this court for the first time, is this. Counsel for respondents argue that this court cannot, within the limitations of its rule-making powers under Section 723(b), Title 28 U. S. C., extend the two-year period prescribed by Rule 25(a) by permitting an enlargement of time under Rule 6(b) or by promulgating the amendment to Rule 25(a) proposed by the Advisory Committee on Rules for Civil Procedure in its report dated June, 1946, which has the same effect.

In our main brief it was shown that the effect of the amendments proposed by the Advisory Committee to Rules 6(b) and (25(a) is specifically to carry over into Rule 25(a) the discretion to act after the expiration of the two-year period upon a showing of reasonable excuse for failure to apply within that period which is provided generally by the present Rule 6(b). We will not reargue that point, but will address ourselves solely to the issue now raised by respondents that neither the general discretionary powers for enlargement of time provided by the present Rule 6(b) nor the specific provision for the exercise of discretion in enlarging the time for substitution of the personal representative of a deceased party to a pending action incorporated in the amendment proposed by the Advisory Committee, is within this court's rule-making powers.

Stripped of its essential , respondents' arguments are that under Section 723(b), Title 28 U. S. C., this court can "neither abridge, enlarge nor modify the substantive rights of any litigant"; that Section 778, Title 28 U. S. C. creates a *substantive* right of revivor and a two-year limitation thereon; that this action abated at common law and

is revived only by force of Section 778; and that this court cannot promulgate a rule which changes the two-year limitation contained in the second paragraph of Section 778.

The premise upon which the argument is based is fallacious. In the first place, Section 778 by its express language does not purport to deal with the substantive question of whether a cause of action survives. It provides merely that when either of the parties in a suit in any court of the United States dies before final judgment, "the executor or administrator of such deceased party may, *in case the cause of action survives by law*, prosecute or defend any such suit to final judgment." (28 U. S. C., Section 778, emphasis supplied.)

The statute did not purport to be determinative of the *substantive* question as to the survival of the cause of action upon the death of a party. It merely provided a *procedure* for bringing in the representatives of a deceased party in the event that the cause of action did survive.

The issue here is not decided by adumbrations concerning the maxim *actio personalis moritur cum persona* nor by reference to cases which fail to distinguish between abatement in the sense that the cause of action does not survive, and abatement in the sense that a pending action is suspended until it is revived by or against the executors or other representatives of a deceased party. Exploration of the ancient recesses of the common law for the origin and effect of the maxim may reveal that all causes of action at one time abated—in the first sense of the word—but as of the time of the American Revolution the common law had emerged at least partially from the obscurity which surrounds its true import and significance. See Holdsworth, *History of the English Law* (3rd Ed.), Vol. III, pp. 576 et seq. As of that date causes of action *ex contractu*

did not abate, *Hambly* v. *Trott* (1776), Cowp. 371, 376; *Sullivan* v. *The Associated Bill Posters and Distributors* (1929), 6 F. (2d) 1000, 1004, the representatives of a deceased person could be made liable in an action of assumpsit upon the obligations of the deceased, Holdsworth, *supra*, pp. 451-2, 578-9, and procedures for reviving an action which survived the death of one of the parties had become a part of law and equity.

The survival of the cause of action to recover the stockholders' liability from deceased defendants in this case is not dependent upon Section 778. The cause of action here rests upon the provisions of the federal acts governing national banks. Sections 63 and 64 of Title 12 U. S. C. imposed double liability upon the shareholders of every national banking association and transferees, and Section 66 imposed the same liability upon the estates and funds in the hands of executors, administrators, guardians or trustees in a like manner and to the same extent as the testator, intestate, ward or persons interested in such trust funds would be liable if living. Where the stockholder dies during the pendency of an action to enforce a stock assessment, this court expressly has held that the cause of action provided by the national bank acts survives and may be enforced against his estate. *Richmond* v. *Irons* (1887), 121 U. S. 27, 55-6; *Matteson* v. *Dent* (1900), 176 U. S. 521, 525; and see *Forest* v. *Jack* (1935), 294 U. S. 158; *Seabury* v. *Green* (1935), 294 U. S. 165; *Pufahl* v. *Estate of Parks* (1936), 299 U. S. 217, and cases cited in Michie, *Banks and Banking*, Volume 7, Chapter 15, Section 98, page 94 et seq.; *Rankin* v. *Miller et al.* (1913), 207 Fed. 602, 611.* The federal banking acts impose no limi-

* In *Richmond* v. *Irons* (1887), 121 U. S. 27, Mr. Justice Matthews said, in part:

"Another assignment of error is peculiar to the appeal of the administrator *de bonis non* of Willian H. Adams, deceased. William H. Adams in his lifetime was one of the defendants in the amended

tation upon the time within which a suit against a stockholder to recover an assessment must be brought, *Rawlings* v. *Ray* (1941), 312 U. S. 96, and no claim is made that the original suit was not commenced within the time permitted by applicable state limitations statutes.

Thus the entire argument of respondents that this action survives by reason of Title 28 U. S. C., Section 778, is based upon a false premise. The cause of action to recover the assessment survived regardless of Section 778. That section merely provided a procedure for bringing in the executor or administrator of a deceased party.

Therefore the question resolves itself to a determination whether the procedure for reviving a cause of action provided by Section 778 was of such a substantive nature as not to be subject to the rule-making power of this court granted under Title 28 U. S. C., Section 723(b).

The argument of the respondents seems to be that without Section 778 the courts of the United States had no power in a case of this nature to substitute the personal representative of a party who died during the pendency

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bill of 1876, and at the time of the suspension of the bank a stockholder to the extent of 240 shares. He died June 6, 1882, during the pendency of the suit, which stands revived as against his administrator *de bonis non*. The administrator contended that the personal liability of his intestate did not survive as against the administrator, and that, therefore, no decree could be rendered against him subjecting the estate of Adams in his hands for administration." (121 U. S. 55.)

After distinguishing Massachusetts cases because the state statutes differed from the national banking act, Mr. Justice Matthews continued, speaking of the language of the national banking act:

"Under that act the individual liability of the stockholders is an essential element in the contract by which the stockholders become members of the corporation. It is voluntarily entered into by subscribing for and accepting shares of stock. Its obligation becomes a part of every contract, debt, and engagement of the bank itself, as much so as if they were made directly by the stockholder instead of by the corporation. There is nothing in the statute to indicate that the obligation arising upon these undertakings and promises should not have the same effect, and be as binding in all respects, as any other contracts of the individual stockholder. We hold, therefore, that the obligation of the stockholder survives as against his personal representatives." (121 U. S. 55-6.)

of an action. This is not so. The case at bar is in equity.[1] Section 778 was not made applicable to suits in equity until 1921, but there was never any doubt that the federal courts had the power to require or permit the personal representatives to come in and prosecute or defend an action which survived a defendant's death. As Mr. Justice Story said in *Clarke* v. *Mathewson* (1838), 12 Peters (37 U. S.) 164, 171:

> "The death of either party, pending the suit, does not, where the cause of action survives, amount to a determination of the suit. . . . in courts of equity, an abatement of the suit, by the death of a party, has always been held to have a very different effect; for such abatement amounts to a mere suspension, and not to a determination of the suit. It may again be put in motion by a bill of revivor, and the proceedings being revived, the cause proceeds to its regular determination as an original bill. The bill of revivor is not the commencement of a new suit; but is the mere continuation of the old suit."

Substitution in equity of the personal representative of a party who died during the pendency of an action was effected through a bill of revivor or a bill of that nature. *Ex parte Slater* (1918), 246 U. S. 128, 133. This procedure was incorporated by this court into Rule 56 of the Rules of Equity Practice. 210 U. S. 526. When this court promulgated new equity rules in 1912 it changed and simplified the procedure for revivor by providing that in the event of the death of a party the suit could be revived upon motion by substitution of the proper parties. Rule 45, 226 U. S. 661. Equity Rule 45 contained no period of limi-

[1] Like *Anderson* v. *Abbott* (1942), 321 U. S. 349, in the Western District of Kentucky, the principal case which determined the liability of shareholders of the Banco-Kentucky Company to respond as the real owners of the stock of the National Bank of Kentucky, this companion case was a bill in equity to enforce the liability against stockholders of Banco-Kentucky residing in the Eastern District of Kentucky.

tations within which revivor had to be applied for. See *Miller* v. *Wattier* (1908), 165 Fed. 359, 361.[2]

Until 1921, Section 778, which adopted the common law writ of *scire facias* as a procedure for the substitution of an executor or an administrator of a deceased party, applied only to actions at law and did not contain any limitation period. In 1921 Congress added paragraphs two and three of Section 778, thereby substituting the procedure by writ of *scire facias* for the remedy by motion previously provided by Equity Rule 45, *supra*. The amendment of 1921 also added the two-year period of limitation which respondents say this court cannot modify under its rule-making powers.

There seems to be no contention that this court acted beyond the scope of its rule-making powers in abolishing the remedy by *scire facias*. *Rules of Civil Procedure*, Rule 81(b), 308 U. S. 764. In substituting the remedy by motion for the remedy by *scire facias*, it has not been suggested that this court abridged the substantive rights of any litigant. When the rules were discussed before the appropriate committees of the House of Representatives and Senate, it was nowhere urged that this court acted beyond the powers delegated to it to promulgate the rules in substituting the remedy by motion for the remedy by *scire facias* previously provided by Section 778. It could scarcely be argued that this substitution was a matter of substance rather than procedure.

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[2] Although the case at bar is in equity, it may be noted in passing that at common law the law courts were not devoid of power to bring in the personal representatives of a litigant where the right of action was one which survived the death of a party. As was said in *Warren* v. *Furstenheim* (1888), 35 Fed. 691, 693, "One class of English statutes having the force of common law with us . . . allowed the executor or administrator to come in voluntarily or be brought in by *scire facias*. It was a condition of these statutes that the revival could take place only 'if such action might be originally prosecuted, or maintained by or against the executors or administrators of the party dying.'" See 47 *American Jurisprudence, Scire Facias*, Section 3, page 466. Congress adopted this remedy in the Act of September 24, 1789, Chapter 20, Section 31, 1 Stat. 90, from which the first paragraph of Section 778 was derived.

If this court can change the remedy previously provided by Section 778 because such a matter is procedural and not substantive, it would seem to follow that any period of limitations applicable to the earlier remedy is also a matter of procedure rather than substance. Although, as this court pointed out in *Guaranty Trust Company* v. *York* (1945), 326 U. S. 99, 108-9, characterization of statutes of limitations as either "substantive" or "procedural" unrelated to a specific issue do not provide a solution for a particular problem, it is true, as this court said in *Michigan Insurance Bank* v. *Elred* (1889), 130 U. S. 693, 696, that statutes of limitations ordinarily are laws affecting remedies only, and not rights. The decisions cited by counsel for respondents are cases where the right of action and the procedure for enforcing it were created by the same statute. Such cases involve statutory rights of action which did not exist at common law, and the period during which the statutory remedy for the statutory right may be enforced was considered to be an integral part of the right of action and not just a limitation upon the remedy. *Texas Cement Co.* v. *McCord* (1914), 233 U. S. 157, cited by counsel for respondents, illustrates the difference between the effect of a limitation contained in a statute which creates a cause of action where none exists apart from that statute, and a limitation such as that involved here. That case involved the construction of the material man's Act of February 24, 1905, as to which Mr. Justice Day, speaking for the entire court, said:

> "By this statute a right of action upon the bond is created in favor of certain creditors of the contractor. The cause of action did not exist before and is the creature of the statute. The act does not place a limitation upon a cause of action theretofore existing, but creates a new one upon the terms named in the statute. The right of action given to creditors is specifically

> conditioned upon the fact that no suit shall be brought by the United States within the six months named, for it is only in that event that the creditors shall have a right of action and may bring a suit in the manner provided. The statute thus creates a new liability and gives a special remedy for it, and upon well settled principles the limitations upon such liability become a part of the right conferred and compliance with them is made essential to the assertion and benefit of the liability itself." (233 U. S. 157, 162.)

In the case at bar, Section 778 did not create the cause of action. The liability of the stockholder and his estate were created by Title 12, U. S. C., Sections 63, 64 and 66.

Treatment of statutes of limitations as "substantive" or "procedural" in situations involving the pursuit of a particular type of remedy point the way toward the proper decision on the particular problem involved here. Thus, if Congress had amended Section 778 by striking out the two-year limitation period, could it be claimed this was a deprivation of property as applied to a case in which the two-year period had already run? In *Campbell* v. *Holt* (1885), 115 U. S. 620, this court pointed out that the usual statute of limitation merely bars a remedy and does not extinguish a right; hence the repeal of a statute of limitation of actions on personal debts does not deprive a debtor, as to whom the time had run, of his property in violation of the Fourteenth Amendment. The principle applied by that case was recently approved by this court in *Chase Securities Corporation* v. *Donaldson* (1945), 325 U. S. 304.

That problems relating to revivor concern procedural rather than substantive law is also indicated by those cases which consider the problem with relation to the conflict of laws. In such cases questions regarding the survival of the cause of action are substantive matters which it is uni-

formly held must be determined by the law of the place where the cause of action arose, but questions regarding revival are treated as matters of procedure to be determined by the law of the forum. *Baltimore and Ohio Railroad Company* v. *Joy* (1899), 173 U. S. 226. And see Annotation, 87 A. L. R. 852.

Commentators on the Rules of Civil Procedure uniformly have stated that the mode, means and manner of substituting the personal representatives of a deceased party and similar matters are procedural. Thus, in *Moore Federal Practice*, 1938, Volume 2, page 2427, it is said, commenting on Rule 25:

> "Rule Does Not Affect Substantive Rights.
> "Rule 25 merely provides the procedure for the substitution of parties; it does not affect substantive rights, which will determine whether the action abates."

Likewise, in *Ohlinger's Federal Practice*, 1939, Volume 3, page 35, it is said:

> "In the annotation to U.S.C. 28:725, cases on survival, abatement and revival are discussed. It is there pointed out that *survival of a cause of action* ("claim for relief" under these rules) is properly a question of substantive law, while *revival of a pending suit* is properly procedural."

In the last mentioned comment it was noted that in the case of *In Re: Connaway, Receiver of Moscow National Bank* (1900), 178 U. S. 421, it was decided that revival is a procedural matter.[3]

Thus respondents are forced to the illogical argument that although the remedy by *scire facias* provided by para-

[3] It should also be noted that in the United States Code, prepared under the authority of Title 1, U. S. C., Section 52, Section 778 is included under Chapter 18 of the Judicial Code. Chapter 18 is headed: "Procedure."

graph one of Section 778 was a procedural or remedial matter which this court could change under its rule-making powers, the limitation upon that remedy added by Congress in 1921, over 130 years after the original remedy was adopted from the common law, rises above the status of a procedural matter and becomes substantive and, therefore, beyond the power of this court to change. We think that the authorities above referred to clearly show that the entire matter of the remedy for substituting the personal representatives of a deceased party, and particularly any limitations thereon, is entirely procedural and well within the rule-making powers of this court.[1]

Respectfully submitted,

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[1] It may be noted that somewhat the same contention as that which respondents urge here might be made with respect to Rule 73(a). The Advisory Committee has proposed an amendment which changes the time within which an appeal from the district court to a circuit court of appeals may be made. The time differs from that prescribed by Title 28, U. S. C., Section 230. That such a change of the statutory time is considered a procedural matter well within the rule-making powers of the court is indicated by the fact that this amendment was recommended by the Judicial Conference of the Senior Circuit Judges. See report of Advisory Committee, June 1946, pages 92-95.

APPENDIX

STATUTES INVOLVED

12 U. S. C.

§ 63. Individual liability of shareholders.

The shareholders of every national banking association shall be held individually responsible, equally and ratably and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares; except that shareholders of any banking association existing on June 22, 1874, under State laws, having not less than $5,000,000 of capital actually paid in, and a surplus of 20 per centum on hand, both to be determined by the Comptroller of the Currency, shall be liable only to the amount invested in their shares; and such surplus of 20 per centum shall be kept undiminished, and be in addition to the surplus provided for in this chapter; and if at any time there is a deficiency in such surplus of 20 per centum, such association shall not pay any dividends to its shareholders until the deficiency is made good; and in case of such deficiency, the Comptroller of the Currency may compel the association to close its business and wind up its affairs under the provisions of this chapter relating to dissolution and receivership. R. S. § 5151.

12 U. S. C.

§ 64. Same; transfer of shares.

The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock. The stockholders in any national banking association who shall have transferred their shares or registered the transfer thereof within sixty days next before the date of the failure of such association to meet its obligations, or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer, to the extent

that the subsequent transferee fails to meet such liability; but this provision shall not be construed to affect in any way any recourse which such shareholders might otherwise have against those in whose names such shares are registered at the time of such failure. Dec. 23, 1913, c. 6, § 23, 38 Stat. 273.

12 U. S. C.

§ 66. Personal liability of representatives of stockholders.

Persons holding stock as executors, administrators, guardians, or trustees, shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust funds would be, if living and competent to act and hold the stock in his own name. R. S. § 5152.

28 U. S. C.

§ 723b. Rules in actions at law; Supreme Court authorized to make.

The Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect. June 19, 1934, c. 651, § 1, 48 Stat. 1064.

28 U. S. C.

§ 778. Death of parties; substitution of executor or administrator.

When either of the parties, whether plaintiff or petitioner or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of

action survives by law, prosecute or defend any such suit to final judgment. The defendant shall answer accordingly, and the court shall hear and determine the cause and render judgment for or against the executor or administrator, as the case may require. And if such executor or administrator, having been duly served with a scire facias from the office of the clerk of the court where the suit is depending twenty days beforehand, neglects or refuses to become party to the suit, the court may render judgment against the estate of the deceased party in the same manner as if the executor or administrator had voluntarily made himself a party. The executor or administrator who becomes a party as aforesaid shall, upon motion to the court, be entitled to a continuance of the suit until the next term of said court.

The provisions of this section shall apply to suits in equity and in admiralty as well as to suits at law, and the jurisdiction of all courts of the United States shall extend to and over executors and administrators of any party, who dies before final judgment or decree, appointed under the laws of any State or Territory of the United States, and such courts shall have jurisdiction within two years from the date of the death of the party to the suit to issue its scire facias to executors and administrators appointed in any State or Territory of the United States which may be served in any judicial district by the marshal thereof. No executor or administrator shall be made a party unless such service is made before final settlement and distribution of the estate of said deceased party to the suit.

This section shall apply to suits in which any party has deceased prior to November 23, 1921, as well as to suits in which any party may have died thereafter or may die hereafter. (R. S. § 955; Nov. 23, 1921, c. 142, §§ 1, 2, Stat. 324; Dec. 22, 1921, c. 18, 42 Stat. 352.)

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No. 1104 87

IN THE

Supreme Court of the United States

October Term, 1945

A. M. ANDERSON, Receiver of National Bank of Kentucky, Louisville, Kentucky,

Petitioner,

vs.

IRVIN YUNGKAU, Executor of the Estate of Albert Yungkau, Deceased, et al.,

Respondents.

BRIEF FOR RESPONDENT, HENRY G. SANDIFER, ON PETITION FOR WRIT OF CERTIORARI.

HENRY G. SANDIFER,
R. T. DICKERSON,
GEORGE W. LUEDEKE,
Attorneys for Respondent, Henry G. Sandifer, Executor of Estate of Alexander B. Massey, Deceased.

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IN THE

Supreme Court of the United States

October Term, 1945

No. 1104

A. M. ANDERSON, Receiver of National Bank of Kentucky, Louisville, Kentucky,

Petitioner,

vs.

IRVIN YUNGKAU, Executor of the Estate of Albert Yungkau, Deceased; H. E. FRANZ, Executor of the Estate of William R. Gilpin, Deceased; LUCY LOGAN MASSIE, Executrix of the Estate of William K. Massie, Deceased; BEN WILLIAMSON, Jr. and DAVID GEIGER, Co-Executors of the Estate of Ben Williamson, Deceased; WATT M. PRICHARD and CHARLES V. KITCHEN, Co-Executors of the Estate of James H. Kitchen, Deceased; CATHERINE C. KITCHEN, Executrix of the Estate of John W. Kitchen, Deceased; HENRY G. SANDIFER, Executor of the Estate of Alexander B. Massey, Deceased,

Respondents.

BRIEF FOR RESPONDENT, HENRY G. SANDIFER, ON PETITION FOR WRIT OF CERTIORARI.

STATEMENT

For the convenience of the Court we shall follow the topics in petitioner's brief and in the order they there appear.

The "summary statement" in petitioner's brief states the situation fairly well. We do not agree that the District Court failed to relieve against a "miscarriage of justice" by enforcing a limitation of Rule 25 (a), the same being in all particulars like a statute of limitations as to the bringing of an original action.

OPINION BELOW

We invite a careful reading of these opinions.

JURISDICTION.

We do not question this Court's jurisdiction to review this cause, if it is of opinion it should do so.

THE QUESTIONS PRESENTED

The petitioner has stated the question he desires to present to the Court. Our position is that Rule 25 (a) takes the place of Sect. 778 Jud. Code, provides the same limitation as to the time within which an action may be revived and merely reaffirms the said Code Section; that Rule 6 (b) was not intended nor does it extend the time that the Court may revive an action; that Rule 6 (b) merely gives relief as to an excusable delay, as to an act to be done by a party to a suit, but does not enlarge the time given the Court to act, where action by the Court is required, and does not control the specific provisions of Rule 25 (a).

REASONS RELIED ON FOR WRIT OF CERTIORARI.

Petitioner states "the decision of the Court is without precedent". There are decisions hereinafter mentioned where Rule 25 (a) has been enforced after consideration of Rule 6 (b) and other decisions holding the limitations of other Rules are not affected by Rule 6 (b), although not excepted in that rule. About eight years have elapsed since the Rules of Civil Procedure were adopted, and as Petitioner states, this is the first time Rule 25 (a) has been questioned, as not fixing the same limitation as to revivor of actions as existed prior thereto in Section 778, Jud. Code.

The Advisory Committee has not interpreted Rule 25 (a) or Rule 6 (b) as the petitioner, but merely intends to make clear that Rule 25 (a) provides a clear and *fixed* limitation of the time *within which an action may be revived.* It is only after eight years that the Advisory Committee finds it desirable to so act in order to carry out in a clearer manner its original intention.

SPECIFICATIONS OF ERROR

We affirm that the Courts below did not err in either of the two ways mentioned by the petitioner.

ARGUMENT

The petitioner states this is a case this Court should review because "it involves a conflict between the Rules of Federal Procedure which has been resolved differently by inferior Courts." The petitioner has not pointed out in his brief, or can he, a single case wherein Rule 25 (a) was held to be modified by the provisions of Rule 6 (b).

It is then stated the question is of general interest and concern. About eight years have passed since the Rules of Civil Procedure were drawn and put in force and this is the first time an attempt has been made to modify Rule 25 (a) by the provisions of Rule 6 (b), except, perhaps in *Winkelman* v. *General Motors Corporation*, 30 F. Supp. 112, wherein the Court applied Rule 25 (a) and Section 778 Judicial Code and found the action must be revived *within* two years of the defendant's death. Therefore the only time this question has been raised by one, other than the petitioner herein, in a lower Court in eight years, it was decided contra to the petitioner's contention. We therefore say the question herein is not of general interest and if the Advisory Committee acts, it will not be possible to plausibly raise it in the future. The attempt to use Rule 6 (b) in the *Winkelman* v. *General Motors Corporation* case, and the like attempt in this case, has no doubt caused the Advisory Committee to propose to make clear its original intent that Rule 6 (b) in no way affected Rule 25 (a) and the time therein fixed, as is stated at page 8 of petitioner's brief. And the Committee does not propose to leave the question as to the effect of Rule 6 (b) on Rule 25 (a) open, although so far no case has been decided in which Rule 25 (a) has been modified by Rule 6 (b).

The Judicial Code fixed two years in which an action might be revived against an administrator or executor that they might know when they had repose. It was as definite a statute of limitation as any other like statute enacted to bring about repose. To permit a revivor after two, or three or ten years because of "excusable" neglect would be to do away with all limitation and all repose.

Rule 25 (a) provides:

> "If a party dies and the claim is not thereby extinguished, *the Court within two years* after the death may order substitution of the proper parties."

The Court by this rule is permitted, as by Section 778, Jud. Code, to act within two years after the parties death. Thereafter by the Section of the Code and by the Rule, last mentioned, *the Court does not have* jurisdiction to revive the action against the executor or administrator. The Rule recognizes this and then goes on to provide:

> "If substitution is not so made, the action shall be dismissed as to the deceased party".

The Court has lost jurisdiction of the cause, as to the deceased party, and the language last quoted orders the cause then be dismissed as to him. The word "shall", is obviously used in the sense of "must", not "may". To permit the action to remain unrevived would serve no purpose. The time within which substitution of parties may be made, having elapsed, the action is dead, and to read the last quoted part of Rule 25 (a) as follows:

> "If substitution is not so made, the action "*may*" be dismissed as to the deceased party".

merely leaves the matter of letting a dead action remain on the Court's docket, or striking it off, to the discretion of the Court. Obviously the Rule intends for the action to be dismissed.

We ask the Court to read that part of the Court of Appeals opinion at page 30 of the Record where the only authorities upon the question herein involved are reviewed and commented upon. We particularly invite the

Court's attention to the comments upon *Wallace* v. *United States*, 142 F. (2d) 240, 244 (C. C. A. 2) where Rule 6 (b) was found not to permit the Court to enlarge the six month period for a motion to relieve from a judgment provided in Rule 60 (b).

The revivor within two years is an action *to be taken by the Court.* The provisions of Rule 6 (b) are obviously to provide against excusable neglects *of parties to do certain acts.* Its provisions are very general. The language of Sect. 778 Jud. Code, restated in Rule 25 (a), could not be more specific. As stated by the Court of Appeals of the District of Columbia in *Burke* v. *Canfield*, 111 F. (2d) 526, 527, where Rule 6 (b) was claimed to modify Rule 73 (g), the words of limitation must have been used advisedly, and it is the general rule that general language must yield to particular, where both apply to the case at hand and the plain intent is not defeated by such construction. That Court then disapproved *Ainsworth* v. *Gill Glass & Fixture Co.* 104 F. (2d) 83, for that reason and cites *Bailey* v. *Allen E. Walker*, 55 App. D. C. 74, 2 F. (2d), 123.

Rule 6 (b) has been used (with the claim of excusable delay) in connection with Rules 25 (a), 60 (b) and 73 (a) and in each instance, except in *Ainsworth* v. *Gill, supra,* the Courts have uniformly held the general language of Rule 6 (b) did not apply to change specific language in the other Rules mentioned. It would appear therefore, that the proposed action of the Advisory Committee in changing Rule 6 (b) to conform to Sect. 778 Jud. Code, and the evident original intent of the Committee, is hardly necessary, except to make things so clear, questions such as petitioner has raised can no longer be presented to the courts. The Advisory Committee proposes to give

clearer meaning to Rule 25 (a) by excepting it from the operation of Rule 6 (b) and therefore shows it never "intended to relieve against the injustice and the hardship of an unyielding application of the executioner's knife", etc., as stated at page 9 of petitioner's brief, but always had in mind, and now has in mind, that administrators and executors should be given repose as to unrevived actions after two years, and not be compelled to hold estates open indefinitely to see if attempted revival of actions are to take place. Such defendants are entitled to repose after a limited period the same as one who may be sued because of an automobile accident. The Advisory Committee advise affirming what the Courts have held by making clear the meaning of Rule 6 (b). We know of no other litigant than the petitioner who would benefit from this Court reviewing this cause.

CONCLUSION

The Court of Appeals has properly determined the question herein and this Court can hardly be called upon to review all decisions of Courts of Appeals on all questions never specifically brought before this Court, and the writ of certiorari should not be granted.

HENRY G. SANDIFER
R. T. DICKERSON
GEORGE W. LUEDEKE
Attorneys for Respondent
HENRY G. SANDIFER
Executor of Estate of
Alexander B. Massey, Deceased.

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NO. 1024 87

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

A. M. ANDERSON, RECEIVER OF NATIONAL BANK OF KENTUCKY, LOUISVILLE, KENTUCKY,
Petitioner,

V.

IRVIN YUNGKAU, EXECUTOR OF THE ESTATE OF ALBERT YUNGKAU, DECEASED; H. E. FRANZ, EXECUTOR OF THE ESTATE OF WILLIAM R. GILPIN, DECEASED; LUCY LOGAN MASSIE, EXECUTRIX OF THE ESTATE OF WILLIAM K. MASSIE, DECEASED; BEN WILLIAMSON, JR., AND DAVIS GEIGER, CO-EXECUTORS OF THE ESTATE OF BEN WILLIAMSON, DECEASED; WATT M. PRICHARD AND CHARLES V. KITCHEN, CO-EXECUTORS OF THE ESTATE OF JAMES H. KITCHEN, DECEASED; CATHERINE C. KITCHEN, EXECUTRIX OF THE ESTATE OF JOHN W. KITCHEN, DECEASED; HENRY SANDIFER, EXECUTOR OF THE ESTATE OF ALEXANDER B. MASSEY, DECEASED,
Respondents.

BRIEF OF RESPONDENTS, BEN WILLIAMSON, JR., AND DAVIS GEIGER, CO-EXECUTORS, ETC.; WATT M. PRICHARD AND CHARLES V. KITCHEN, CO-EXECUTORS, ETC.; AND CATHERINE C. KITCHEN, EXECUTRIX, ETC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

LeWRIGHT BROWNING
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STANDARD PTG. & PUB. CO., LAW PRINTERS, HUNTINGTON, W. VA.

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A. M. ANDERSON, RECEIVER OF NATIONAL BANK OF KENTUCKY, LOUISVILLE, KENTUCKY,

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Respondents.

BRIEF OF RESPONDENTS, BEN WILLIAMSON, JR., AND DAVIS GEIGER, CO-EXECUTORS, ETC.; WATT M. PRICHARD AND CHARLES V. KITCHEN, CO-EXECUTORS, ETC.; AND CATHERINE C. KITCHEN, EXECUTRIX, ETC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The opinion of the Circuit Court of Appeals for the Sixth Circuit delivered herein is reported in *153 Fed. (2) 685* (Advance Sheets). No opinion was delivered by the

District Court, the ruling being based upon the opinion of that court reported in *1 F. R. D. 589.*

THE QUESTION INVOLVED

The question involved herein is whether or not a power to extend the right of revivor beyond the two year period of limitation prescribed by *Rule 25* and *Section 778, 28 U.S.C.A.*, may be imported into the rule and statute via the provisions of *Rule 6 (b)*.

ARGUMENT

Rule 25 (a) has the same effect as a statute of limitation with respect to the revival of an action against the estate of a decedent, and by its terms a binding duty rests upon the court to dismiss the action if revivor is not had within the two year period.

The mandatory language of *Rule 25 (a)* is not nullified by *Rule 6 (b)*. The latter rule is designed to afford relief to a *party* whose failure to take timely required steps might be properly classified as "excusable neglect," but it does not apply to affirmative action required of the court by the plain language of *Rule 25 (a)*.

The limitation prescribed by *Rule 25 (a)* is the same as the statutory period prescribed in *Sec. 778, 28 U.S.C.A.*, and the words of limitation found in the rule must have been used advisedly; consequently the general language of *Rule 6 (b)* must yield to the specific requirement of *Rule 25 (a)*.

Rule 6 (b) refers to acts or steps permitted or required to be done by the *parties*. It has no reference to actions required to be taken by the *court* where such action is provided for by another rule.

The requirement of *Rule 25 (a)* that "the action *shall* be dismissed" in the event of failure to revive within the two year period of limitation is mandatory. When *Rule 25 (a)* was promulgated, the period of limitation therein prescribed was a right existing under the provisions of *Sec. 778, 28 U.S.C.A.*, and consequently "shall" as used in the rule is to be construed as "must." *West Wisconsin Ry. Co. v. Foley, 94 U. S. 100, 24 L. Ed. 71; Ex Parte Jordan, 94 U.S. 248, 24 L. Ed. 123; Escoe v. Zerbst, 295 U.S. 490, 79 L. Ed. 1566.* The word "shall" in a statute is normally "the language of command," and where, as in *Rule 25 (a)*, there is the use of both "may" and "shall" in the same paragraph, the necessary implication is that each word is used in its ordinary sense and not in the ordinary sense of the other. *United States v. Thoman, 156 U.S. 353, 39 L. Ed. 450; State v. Wendling Bros Co. 127 Ohio St. 336, 184 N.E. 566; Murray v. Edes Mfg. Co. 305 Mass. 311, 25 N.E. (2) 746; 50 Am. Jur. p. 51, Sec. 30; 25 R. C. L., p. 767, Sec. 15.*

The explicit exception from the scope of *Rule 6 (b)*, of *Rule 59* and the period for taking an appeal, does not operate to make the provisions of *Rule 6 (b)* applicable to *Rule 25 (a)*; the interpretative device embodied in "expressio unius exclusio alterius" must yield to the emphatic language of *Rule 25 (a). Securities & Exchange Commission v. C. M. Joiner Leasing Corp. 320 U.S. 344, 350, 88 L. Ed. 88; Wallace v. United States (C.C.A.2) 142 Fed. (2) 240.*

The recommendation of the Advisory Committee on Rules for Civil Procedure as contained in the Second Preliminary Draft, that *Rule 6 (b)* be amended so as to expressly exclude *Rule 25* from its scope, can not be construed as a recognition that *Rule 6 (b)* in its present form is applicable to *Rule 25*. Rather, the purpose of the proposed amendment is to make certain that *Rule 25* shall be

construed as it was construed in this proceeding (see p. 3, Report). The following language of the report is significant (p. 6):

> "As to Rule 25 on substitution, while finality is not involved, the limit there fixed should be absolute, as it always has been by statute."

It may be remarked that if the foregoing recommendation is approved, then the question herein presented would be only of academic interest.

The decision of the Circuit Court of Appeals is in accord with the prior ruling of the District Court in *Anderson v. Brady, 1 F. R. D. 589*, and with the ruling of Judge Mandelbaum in *Winkelman v. General Motors Corp. 30 F. Supp. 112.* It is also in accord with the construction of *Rule 6 (b)* as applicable to *Rule 60 (b)* in *Wallace v. United States (C.C.A.2) 142 Fed. (2) 240*, (cer. den. *323 U. S. 712, 89 L. Ed. 573)* and with the construction of *Rule 6 (b)* as applicable to *Rule 73 (g)* in *Burke v. Canfield (App. D.C.) 111 Fed. (2) 526*, and in *Mutual Benefit Health & Accident Assn. v. Snyder (C.C.A.6) 109 Fed. (2) 469.*

Sec. 778, 28 U.S.C.A. prescribes both a limitation of action and a limitation on the jurisdiction of the courts. Neither could be affected or altered by the Rules of Civil Procedure. That this is so is obvious from the plain language of *Section 723 (b), 28 U.S.C.A.*, which is the authority for the Federal Rules. *United States v. Sherwood, 312 U.S. 584, 85 L. Ed. 1058.* Limitation is a substantive right. *Michigan Insurance Bank v. Eldred, 130 U.S. 693, 32 L. Ed. 1080; Guaranty Trust Co. v. York, 326 U.S. 99, 89 L. Ed. 2079.* Consequently, the period of limitation for revivor prescribed in *Sec. 778* may not be enlarged on restricted by the Rules of Civil Procedure.

It is respectfully submitted that the petition for certiorari should be denied.

LeWRIGHT BROWNING
Counsel for Respondents, Ben Williamson, Jr., and Davis Geiger, Co-Ex'rs., etc., Watt M. Prichard and Charles V. Kitchen, Co-Ex'rs., etc., and Catherine C. Kitchen, Ex'x, Etc.

IN THE

Supreme Court Of The United States

No. 87

A. M. ANDERSON, RECEIVER OF NATIONAL BANK OF KENTUCKY, LOUISVILLE, KENTUCKY, - - - - *Petitioner,*

vs.

BRIEF FOR DEFENDANTS, IRVIN YUNGKAU, EXECUTOR OF THE ESTATE OF ALBERT YUNGKAU, DECEASED, AND H. E. FRANZ, EXECUTOR OF THE ESTATE OF WILLIAM R. GILPIN, DECEASED.

IRVIN YUNGKAU, ET AL, - - - - *Defendants.*

H. R. DYSARD,
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EDWARD M. BROWN,
Attorneys for Petitioner.

GRABER PRINTING COMPANY, ASHLAND, KENTUCKY.

SUBJECT INDEX

The opinions below and which are appealed from are found in 153 Fed. (2nd) 685.

No written opinion was filed by the District Judge, who decided this case, but he relied on Anderson v. Brady, 1 F. R. D. 589.

JURISDICTION

Jurisdiction is conceded.

QUESTION INVOLVED

The question to be decided is whether Rule 25 means what it says. We think it should be held that it does. To hold otherwise would open up every estate in the United States. No justification is given herein for such sweeping relief.

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IRVIN YUNGKAU, ET AL, - - - *Defendants.*

MAY IT PLEASE THE COURT:

ARGUMENT

Responding to the petitioner's brief herein, we desire to say Albert Yungkau was engaged in the wholesale meat business in Ashland, Kentucky, for many years before he died. He died on July 19, 1941. Notice of his death and his picture were carried in all the papers in the country, including the Cincinnati Enquirer, the Ashland Daily Independent, and notice of his death was carried in the Courier-Journal, Huntington Herald - Dispatch, and probably other papers. The facts are stipulated on pages 5 and 6 of the transcript of the record, showing his death, the probating of his will on July 28, 1941, and his estate immediately being delivered to the beneficiaries under his will. Now,

three years after his death, a motion is made to revive this action against his executor.

In petitioner's brief counsel lays stress on the fact that people moved about because of the war. We have already responded to that insofar as Albert Yungkau is concerned. While we do not represent Ben Williamson, the argument does not apply to him because he was a United States Senator from Kentucky at one time and engaged in the wholesale hardware business in Ashland, Kentucky, for probably fifty (50) years, and it would not apply to James H. Kitchen or John W. Kitchen because one was President and the other Vice-President of the Second National Bank of Ashland, Ashland, Kentucky, and their deaths were in all the publications circulating in Louisville, Ci. cinnati, and Ashland. The change of residence because of the war had nothing to do with any of these men. It is inconceivable that some of these attorneys or employees of this Receiver, or the Receiver himself didn't see and know about the deaths of these prominent men, but whether they knew it or not, we do not think that the fact they didn't know it would justify this court in upsetting a limitation fixed by the Federal Courts to revive these actions where the defendant dies. About the only excuse that petitioners have is that they were busy and didn't know about the deaths of these prominent men, when a postal card to any lawyer in Ashland or any business man in Ashland would have informed them of the death of these prominent men. Having neglected to keep track of these parties that they had sued, they now come in and upon the ground that they should be excused for their negligence, they come into this court and ask this court to change the law of this country on the period of time they have to revive or

substitute the administrator or the executor to do the thing that should have been done within two (2) years. One of the charges so often leveled at the courts today is that they decide what the law makers should have done and not what they did do. In other words, the charge is that the inclination of the court is to legislate instead of interpret.

In the case against Yungkau the facts are that the beneficiaries received the assets and thought this case was closed three (3) years before this motion, and if two (2) years can be enlarged to three (3) years why can it not be enlarged to any other length of time with the result that you could never know when an estate was settled. We do not understand that these stipulations excuse this Receiver and his attorneys from at least every two (2) years checking up. It is not far from Ashland to Louisville, and not far from Ashland to Cincinnati, and the death of every one of these men was reported in the Cincinnati and Louisville papers, together with their pictures — at least three of them, Ben Williamson, J. H. Kitchen, and J. W. Kitchen, in the banking journals.

For the defendant, William R. Gilpin, a stronger case in point of elapsed time is presented. As shown on page 7 of the transcript of the record, William R. Gilpin died on January 23, 1937, so that almost five years passed by before World War II ensued. Almost eight years after his death, the petitioner sought to revive this action against the Gilpin Estate. The actual fact is that no effort was ever made to investigate the status of the various defendants and the petitioner has exercised no actual diligence. It would have been a simple matter before the expiration of two years, after

February 18, 1936, when this action was filed, to ascertain from the court records in Boyd County, Kentucky, the death of the Defendant Gilpin. We submit that anything short of an investigation of the status of the various defendants is not equivalent to diligence in the performance of duty. The petitioner now seeks to excuse his lack of diligence by the number of defendants involved and by incidence of World War II. Rule 25A clearly defines the duty of the petitioner, and there is actually no ambiguity in its terms. It concerns the exact situation involved in this case, and is so emphatic as to preclude any exceptions.

We feel that this judgment was proper and should be sustained.

H. R. DYSARD,
and
DYSARD & DYSARD,
Counsel for Albert Yungkau.

R. D. DAVIS,
Counsel for H. E. Franz.

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No. 87

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

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BRIEF FOR RESPONDENTS, BEN WILLIAMSON, JR., AND DAVIS GEIGER, CO-EXECUTORS, ETC.; WATT M. PRICHARD AND CHARLES V. KITCHEN, CO-EXECUTORS, ETC.; AND CATHERINE C. KITCHEN, EXECUTRIX, ETC.

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No. 87 ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

A. M. ANDERSON, RECEIVER OF NATIONAL BANK OF KENTUCKY, LOUISVILLE, KENTUCKY,

Petitioner,

v.

IRVIN YUNGKAU, EXECUTOR OF THE ESTATE OF ALBERT YUNGKAU, DECEASED; H. E. FRANTZ, EXECUTOR OF THE ESTATE OF WILLIAM R. GILPIN, DECEASED; LUCY LOGAN MASSIE, EXECUTRIX OF THE ESTATE OF WILLIAM K. MASSIE, DECEASED; BEN WILLIAMSON, JR., AND DAVIS GEIGER, CO-EXECUTORS OF THE ESTATE OF BEN WILLIAMSON, DECEASED; WATT M. PRICHARD AND CHARLES V. KITCHEN, CO-EXECUTORS OF THE ESTATE OF JAMES H. KITCHEN, DECEASED; CATHERINE C. KITCHEN, EXECUTRIX OF THE ESTATE OF JOHN W. KITCHEN, DECEASED; HENRY SANDIFER, EXECUTOR OF THE ESTATE OF ALEXANDER B. MASSEY, DECEASED,

Respondents.

BRIEF FOR RESPONDENTS, BEN WILLIAMSON, JR., AND DAVIS GEIGER, CO-EXECUTORS, ETC.; WATT M. PRICHARD AND CHARLES V. KITCHEN, CO-EXECUTORS, ETC.; AND CATHERINE C. KITCHEN, EXECUTRIX, ETC.

This litigation involves the construction of Rules 6 (b) and 25 (a), Federal Rules of Civil Procedure, and presents for decision the following questions:

First, whether or not a power to extend the right of revivor beyond the prescribed period of limitation may be imported into Rule 25, via Rule 6 (b)?

Second, if the above inquiry be answered in the affirmative, is the result of such construction a violation of the prohibition contained in *Sec. 723 (b), Title 28 U. S. C. A.*, reading, "said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant," in view of the two year period of limitation upon the right of revivor prescribed by *Sec. 778, Title 28, U. S. C. A.?*

ARGUMENT

THE TWO YEAR PERIOD OF LIMITATION PRESCRIBED IN RULE 25 (a) MAY NOT BE ENLARGED.

The opinion herein of the Sixth Circuit Court of Appeals *(153 Fed. (2) 685)*, and of the District Court in *Anderson v. Brady, 1 F. R. D. 589*, fully and clearly set out the reasoning upon which is based the contentions of respondents that the following language of *Rule 25 (a) (1), Federal Rules of Civil Procedure*, is a mandatory restriction upon the exercise of discretion to extend the time for revivor beyond the two year limitation:

> "If a party dies and the claim is not thereby extinguished, the court within 2 years after the death may order substitution of the proper parties. If substitution is not so made, the action shall be dismissed as to the deceased party."

Consequently, we content ourselves with the following summarization:

First: Rule 25 (a) (1) has the same effect as a statute of limitation with respect to the revival of an action against the estate of a decedent. That it was the

purpose of the rule to prescribe a period of limitation upon the right of revivor is apparent from the fact that the rule was derived from *Sec. 778, 28 U.S.C.A.*, which fixed the same period of limitation as that contained in the rule. That the statutory provision was a statute of limitation is obvious, and the rule manifests no purpose to change, modify, or extend, the statutory period, but on the contrary, expressly commands the court to dismiss the action if revivor is not had within the period prescribed by the rule and statute.

Second: Where the time within which revivor may be had is absolutely fixed by statute, the failure to revive within the prescribed time is fatal, and "excusable neglect" is no more effective to avoid the bar of a definite limitation than is a failure to bring an original action within the time limit fixed by statute.

There is no ambiguity in the language of Rule 25 (a) (1). It provides that substitution may be made within two years after death, and then directs that "if substitution is not so made, the action shall be dismissed as to the deceased party." The meaning of such language is plain and unmistakable. See *Whelan v. Welch (App. D. C.) 269 Fed. 689, 692; 1 C. J., pages 240, 241, Sec. 520; 1 C. J. S., pages 230, 231, Sec. 179.*

Third: The definite mandatory limitation contained in both the statute (Sec. 778) and the rule (Rule 25 (a) (1), may not be broadened by the importation of an exception via Rule 6 (b). The words of limitation in the rule must have been used advisedly, since they are derived from the statute in force at the time of the adoption of the rule. The general language of Rule 6 (b) must, under the established rule of construction, give way to the particular and specific language of Rule 25 (a) (1), for otherwise the plain meaning and intent of the latter rule would be de-

feated. In answer to a similar attempt to broaden the specific limitation contained in Rule 73 (g), it was said in *Burke v. Canfield (App. D. C.) 111 Fed. (2) 526:*

> "It has been said that Rule 6 (b) permits an extension to be granted even after expiration of the 40 days. Ainsworth v. Gill Glass & Fixture Co., 3 Cir., 104 F. 2d 83. But if the broad language of the latter rule applies, then the language of Rule 73 (g) quoted above is superfluous. The words of limitation must have been used advisedly, and it is an established rule that general language yields to the particular, where both apply to the case at hand and the plain intent is not defeated by such a construction. Bailey v. Allen E. Walker, 55 App. D. C. 74, 2 F. 2d 123. Rule 6 (b), therefore, has no application to extensions of time for the filing of the record and docketing of the case on appeal, since the subject is dealt with specifically in Rule 73 (g)."

And in *Wallace v. United States (C.C.A. 2) 142 Fed. (2) 240,* (cer. den. *323 U. S. 712),* it was sought to broaden the 6 months limitation of Rule 60 (b) upon the right of a party to obtain relief from a judgment or order taken against him through his mistake, inadvertence, surprise, or excusable neglect, by the argument that Rule 6 (b) permitted such enlargement notwithstanding the specific limitation of Rule 60 (b). In denying such argument, it was said:

> "The terms of Rule 60 (b)—'but in no case exceeding six months'—are so emphatic as to preclude the importation of an exception via Rule 6 (b)."

The prohibition of Rule 60 (b) "in no case exceeding six months," is no more emphatic and specific than the mandatory direction of Rule 25 (a) (1) that "the action shall be dismissed as to the deceased party" if substitution is not made within the two year period.

Fourth: Petitioner seeks to avoid the mandatory direction of Rule 25 (a) (1) by the argument that the word "shall," though mandatory in character, should in this instance be construed as permissive. But the word "shall" in a statute is normally "the language of command." *Escoe v. Herbst, 295 U. S. 490, 79 L. Ed. 1566; Exparte Jordan, 94 U. S. 248, 24 L. Ed. 123; Brown v. Hecht Co. (App. D. C.) 137 Fed. (2) 689.* And where, as in Rule 25 (a) (1), there is the use of both "may" and "shall" in the same paragraph, the necessary implication is that each word is used in its ordinary sense and not in the ordinary sense of the other. In the opening sentence the word "may" and in the following sentence the word "shall" is used, indicating permission in one and command in the other. *United States v. Thoman, 156 U. S. 353, 39 L. Ed. 450; Brown v. Hecht Co.*, supra; *Ballou v. Kemp (App. D. C.) 92 Fed. (2) 556; Smith v. School Dist. 241 Mich. 366, 217 N. W. 15; 50 Am. Jur. p. 51, Sec. 30; 25 R. C. L. pp. 767-769, Sec. 15.* And especially is the word "shall" to be regarded as peremptory where, as in Rule 25 (a) (1), a right or benefit to anyone depends upon giving it an imperative construction. *West Wisconsin Ry. Co. v. Foley, 94 U. S. 100, 24 L. Ed. 71; United States v. Flynn (D. C. N. Y.), 11 Fed. (2) 899; Lewis' Sutherland Statutory Construction (2nd Ed) p. 1155.*

Fifth: It is also argued by petitioner that since Rule 6 (b) expressly excludes from its operation, (a) the period for taking any action under Rule 59 concerning new trials, and, (b), the period for taking an appeal, it follows that the specification of these two exceptions excludes the "engrafting" of an additional exception upon the rule. Such argument finds its answer in the response of the 2nd Circuit to a similar argument in *Wallace v. United States*, supra, as follows:

> "Wallace argues that Rule 6 (b) permits the court, for cause shown, to extend that six

months' period; he urges that, as that Rule explicitly excepts from its scope only Rule 59 and the period for taking an appeal, it must apply to motions made pursuant to Rule 60 (b). We can not agree. Interpretative devices such as expressio unius exclusio alterius have diminished importance today; they must yield to more obvious indications of intention. The terms of Rule 60 (b)—'but in no case exceeding six months'—are so emphatic as to preclude the importation of an exception via Rule 6 (b)."

See also, *Securities & Exch. Com. v. Joiner Leasing Corp. 320 U. S. 344, 88 L. Ed. 88.*

Sixth: Finally, a careful reading of Rule 6 (b) negatives any idea that it was intended that the rule should apply to, or limit, the mandatory direction in Rule 25 (a) that "the action shall be dismissed as to the deceased party" in the event of a failure to revive the action within the two year period. Rule 6 (b) relates to acts required or allowed to be done *by a party* to the action, and affords relief *to a party* for his failure to take timely required steps. But this rule has no application to action required or demanded *of the court.* So, if Rule 25 (a) had merely provided for the steps to be taken by a party within the two year period in order to obtain a revivor of the action, it might be argued with more force that under the provisions of Rule 6 (b) the time for taking such Steps might be enlarged for "excusable neglect." But Rule 25 (a) further directs the dismissal of the action in the event of a failure to revive within the prescribed period; this is a direction of the action to be taken *by the court*, not *by a party*, and hence Rule 6 (b) is without application. The excuse of "excusable neglect" can have no bearing upon, or reference to, required judicial action.

THE PERIOD OF LIMITATION FOR REVIVOR PRESCRIBED IN SECTION 778, 28 U. S. C. A. MAY NOT BE ENLARGED OR RESTRICTED BY THE RULES OF CIVIL PROCEDURE

The authority for the Federal Rules of Civil Procedure is found in *Sec. 723 b, 28 U. S. C. A.*, which expressly provides that "said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant."

Section 778, 28 U. S. C. A., in the first paragraph, provides for the revivor by or against the personal representative of a deceased party, of any cause of action which survives by law; the second paragraph prescribes the limitation upon such right of revivor or substitution as follows:

> "* * * such courts shall have jurisdiction within two years from the date of the death of the party to the suit to issue its scire facias to executors and administrators appointed in any State or Territory of the United States."

Since all personal actions abate upon death at common law, the right of revivor is purely of statutory origin, and Section 778 both creates such right of revivor or substitution, and prescribes the limitation upon the right so created. Consequently, the language above quoted is not merely a limitation of the remedy, but a limitation of the right. In its entirety, Section 778 is a statute of creation, and the assertion of the right of substitution or revivor within the time specified is an indispensable condition since the time element is an inherent element of the right created by the statute, and the limitation of the remedy is a limitation of the right. The statute is an offer of the right of revivor or substitution on condition that it be exercised within the specified time, and if not so exercised

the right no longer exists. *34 Am. Jur. p. 16, Sec. 7; 37 C. J. p. 686, Sec. 5,* and *p. 732, Sec. 51; United States, etc. v. McCord, 233 U. S. 157, 162, 58 L. Ed. 893; United States v. Wardwell, 172 U. S. 48, 43 L. Ed. 360; Finn v. United States, 123 U. S. 227, 31 L. Ed. 128; Walsh v. Mayor, 111 U. S. 31, 28 L. Ed. 338; Partee v. St. Louis & S. F. R. Co. (C. C. A. 8), 204 Fed. 970; Boston & M. R. Co. v. Hurd (C. C. A. 1) 108 Fed. 116; United States F. & G. Co. v. Tafel Elec. Co. 262 Ky. 792, 91 S. W. (2) 42; Crandall v. Irwin, 139 Ohio St. 253, 463, 39 N. E. (2) 608; 40 N. E. (2) 933, 139 A. L. R. 895; Smith v. Toman, 368 Ill. 414, 14 N. E. (2) 478, 118 A. L. R. 924.* In the last cited case it is said:

> "* * * this court has given consistent recognition to the principle that where the statute creates a right that did not exist at common law and restricts the time within which the right may be availed of, or otherwise imposes conditions, such statute is not a statute of limitation but the time element is an integral part of the enactment. * * * Statutes of limitation relate to the question of remedy by fixing a time within which a suit must be brought. Those statutes which create a substantive right unknown to the common law and in which time is made an inherent element of the right so created, are not statutes of limitation."

We have no intention of burdening the Court with any dissertation upon what is "substantive," or "procedural," or "remedial." As was said by Judge Lowell in *Dexter v. Edmands, 89 Fed. 467,* "The distinction between remedy and substantive right is incapable of exact definition; indeed the difference is somewhat a question of degree,"—a statement that finds confirmation in *Guaranty Trust Co. v. York, 326 U. S. 99, 89 L. Ed. 2079.* That the right of revivor or substitution created by *Sec. 778, 28 U. S. C. A.,* is a substantive right may not be seriously questioned; and

since the limitation upon such right, contained in the same statute, is a limitation upon the right itself, and, therefore, an integral part of the right, it follows that such limitation may not be abridged, enlarged, or modified by the Federal Rules of Civil Procedure. See *Pritchard v. Norton, 106 U. S. 124, 130, 27 L. Ed. 104.*

Directly in point is the decision of the Supreme Court of Tennessee in *Adcox v. Southern Ry. Co., 184 S. W. (2) 37, 156 A. L. R. 1091*, wherein it was held that the right under a Tennessee statute to bring a new suit in the state courts within one year following a judgment of dismissal without a trial on the merits, is a substantive right within the provisions of *Sec. 723, 28 U. S. C. A.*, and may not be abridged, enlarged, or modified by the Federal Rules of Civil Procedure. The court said:

> "We think the right to bring a new suit within one year, following a judgment of dismissal without a trial on the merits, is a substantive right."

It should also be pointed out that the limitation prescribed by Sec. 778 is a limitation upon the jurisdiction of the courts, and, consequently, may not be enlarged. *United States v. Sherwood, 312 U. S. 584, 85 L. Ed. 1058.*

It is respectfully submitted that the decision of the court below should be affirmed.

LeWRIGHT BROWNING
Counsel for Respondents,
Ben Williamson, Jr. and Davis Geiger, Co-Executors, etc., Watt M. Prichard and Charles V. Kitchen, Co-Executors, etc., and Catherine C. Kitchen, Executrix, etc.

No. 87

IN THE

Supreme Court of the United States

October Term, 1946

V. M. ANDERSON, Receiver of National Bank of Kentucky, Louisville, Kentucky,

Petitioner,

vs.

IRVIN YUNGKAU, Executor of the Estate of Albert Yungkau, Deceased, et al.,

Respondents.

BRIEF FOR RESPONDENT HENRY G. SANDIFER

WILLIAM J. PRICE,
HENRY G. SANDIFER,
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IN THE

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No. 87.

A. M. ANDERSON, Receiver of National Bank of Kentucky, Louisville, Kentucky,

Petitioner,

vs.

IRVIN YUNGKAU, Executor of the Estate of Albert Yungkau, deceased; H. E. FRANTZ, Executor of the Estate of William R. Gilpin, deceased; LUCY LOGAN MASSIE, Executrix of the Estate of William K. Massie, deceased; BEN WILLIAMSON, JR., and DAVIS GEIGER, Co-Executors of the Estate of Ben Williamson, deceased; WATT M. PRICHARD and CHARLES V. KITCHEN, Co-Executors of the Estate of James H. Kitchen, deceased; CATHERINE C. KITCHEN, Executrix of the Estate of John W. Kitchen, deceased; HENRY SANDIFER, Executor of the Estate of Alexander B. Massey, deceased,

Respondents.

BRIEF FOR RESPONDENT HENRY G. SANDIFER.

OPINIONS BELOW

The references to the opinions below are correctly given in the brief of the petitioner.

STATEMENT OF THE CASE

The statement of the case as set forth in the brief of the petitioner is accepted subject to the comment that the question involved is not so much as to whether Rule 6 (b) means what it says as that the specific Rule 25 (a) means exactly what it says; that the effect of the holding of the courts below was to hold the application of Rule 6 (b) within the bounds permissible under the limitations of Section 723 (b) and (c) and Section 778 of Title 28 of the United States Code.

ARGUMENT

It was the holding of the lower courts, and our contention, that the fact that the petitioner had a great number of cases, and did not learn of the deaths of the decedents, whose estates are represented by the respondents, for more than two years after the deaths of the decedents is not material.

> "In our judgment", said the Circuit Court of Appeals in this action, "Rule 25 (a) (1) has the same effect as a statute of limitation with respect to the revival of an action against the estate of a decedent. * *
> "'Excusable neglect' to revive an action within a period of definite lawful limitation is no more effective in avoidance of the bar than is the failure to bring an original action within the time limit fixed by statute. The Court is without jurisdiction to excuse 'excusable neglect' in either instance".

It is our position that Rule 25 (a) is merely a reaffirmance of Section 778 of the Judicial Code, which provided a

definite statutory limitation. The reviving of an action is essentially the same as the bringing of a new action.

> "Prior to the adoption of Rule 25 (a) (1), the period of limitation for reviving an action against the estate of a defendant was fixed by Section 778 of the Judicial Code at two years after his death. No purpose is manifested", continued the Circuit Court of Appeals herein, "to change the limitation period in the adoption of the civil procedure rule in question. On the contrary, the same limitation is written into the rule. If, within two years after death, substitution of the proper parties has not been made, the rule commands the court to dismiss the action against the deceased party."

It is our further position that the right of revival in this case accrues solely by virtue of the authorization given by Section 778 of the Judicial Code; that same became a substantive right by force of said statute and the period of limitation within which said right must be exercised became a part of said substantive right.

Furthermore, the Rules of Civil Procedure in force at all times covered by the occurrences and incidents in this case and now in force, were limited and bound by the following restriction in the Act authorizing said Rules, namely, Act of June 19, 1934, c. 651, Secs. 1, 2 (48 Stat. 1064), U.S.C. Title 28 Secs. 723 (b), 723 (c):

> "Said rules shall neither abridge, enlarge nor modify the substantive rights of any litigant."

Certainly, any enlargement by Rule 6 (b) or Rule 25 of the period of two years within which we claim this case must have been revived would be the modification

and abridgment of the substantive rights of respondents.

The historical note in the U. S. Code, Annotated, under Section 778 states:

> "The first paragraph of this section constitutes R. S. Sec. 955, which was derived from Act Sept. 24, 1879 c. 20 Sec. 31, 1 Stat. 90. Act Nov. 23, 1921, c. 142, Sec. 1, cited to the text added thereto the second and third paragraphs."

The Advisory Committee's notes to the present Rule 25, now in force, (Preliminary Draft of Rules of Civil Procedure, etc. dated May 1, 1936, and Draft of April, 1937) said:

> "The first paragraph of this rule is based on Equity Rule 45 (Death of Party-Revivor) and U.S.C. Title 28 S. 778 (Death of parties; substitution of executor or administrator)."

The phraseology of Section 778 is worthy of note:

> "The provisions of this section shall extend to and over executors and administrators of any party, who dies before final judgment or decree appointed under the laws of any State or Territory of the United States and such courts *shall have jurisdiction within two years* from the date of the death of the party to the suit to issue its scire facias to executors and administrators * * *" (Underscoring ours.)

Based upon and following said section, Rule 25 (a) does not attempt to change this meaning or this limitation statute, but pertinently provides:

> "If a party dies and the claim is not thereby extinguished, the Court within two years after

the death may order substitution of the proper parties."

This Rule recognizes revivorship action only within two years after the death of the party, as the Judicial Code limits it by Section 778. Thereafter the Court, as provided by the Code and recognized by the Rule, has no jurisdiction against the executor or administrator. The court has lost jurisdiction of the cause as to the deceased party and his personal representatives and the Rule then succintly provides:

> "If substitution is not so made, the action shall be dismissed as to the deceased party."

As said by the Circuit Court of Appeals, "The language of the rule is clearly imperative."

This Court said in *Green* v. *Watkins* 6 Wheaton 260, cited in re Connaway, Receiver of Moscow National Bank, 178 U. S. 421, 435:

> "In the former case (that of death of parties before judgment) all personal actions at common law abate and it required the aid of some statute like that of the 31st Section of the Judiciary Act of 1789 c. 20 to enable the action to be prosecuted by or against the personal representative of the deceased when the cause of action survived."

This Court said further in The Harrisburg, 119 U. S. 199, 214:

> "The liability and the remedy are created by the same statutes and the limitations of the remedy are, therefore, to be treated as limitations of the right."

> "The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all."

Citing this case and *Texas and N.O.R. Co.* v. *Miller*, 221 U. S. 408, the Federal Court in The Northwestern, 26 F. (2) 290, 291 held:

> "It (a limit of time for bringing suit contained in a statute) is a limitation upon the right created by the statute, and, if suit is not brought within the time limited, the right, not merely the remedy, is lost."

The Circuit Court of Appeals of the 2nd Circuit on July 15, 1946, in the case of *Joint Council, Dining Car Employees Local* v. *Delaware Lackawanna and Western R. Co.*, 9 Federal Rules Service 6 a. 33 Case 2 reversed the District Court on other grounds, but said:

> "* * * We may express agreement with the conclusion raised as to the first point."

That conclusion was expressed by the District Court, Southern District of New York, on September 14, 1945, 9 Federal Rules Service 6 a. 33 Case 1, as follows:

> "A cause of action which accrues by force of a statute derives its substantive force from the statute and the period of limitation provided therein becomes a part of the substantive right and when the period has terminated the right is lost. The Northwestern 26 F. (2) 290, 291; *Central Vermont R. Co.* v. *White* 238 U. S. 507, 511. To permit the extension of the statutory period for an additional day would be to

enlarge the express limitation of the statute. This court is without power to enlarge a substantive right."

This court in 1941 in *U. S.* v. *Sherwood*, 312 U. S. 584, 589, said:

> "An authority conferred upon a court to make rules of civil procedure for the exercise of its jurisdiction is not an authority to enlarge that jurisdiction; and the Act of June 19, 1934, 48 Stat. 1064, 28 U. S. C. 723 (b) authorizing this Court to prescribe rules of procedure in civil actions gave it no authority to modify, abridge or enlarge the substantive rights of litigants or to enlarge or diminish the jurisdiction of federal courts."

Not only does the language of limitation in Sec. 778 and Rule 25 carry emphasis from its expressiveness and definitiveness, but the position of this Court from *Beatty* v. *Burnes* 12 U. S. 8 Cranch 98, wherein Justice Story observed with approval, "Now the statute of limitations has been emphatically declared a statute of repose", following equal approval by Chief Justice Marshall in *Adams* v. *Woods* 6 U. S. 2 Cranch 336, 342, through like approval in the recent case of *Telegraphers* v. *Railway Express Co.* 321 U. S. 342, has been to regard statutes of limitation with favor as "designed to promote justice"; as expressed in the last named case. In *Campbell* v. *Haverhill*, 155 U. S. 609 this Court said:

> "Whatever prejudice there may have been in ancient times against statutes of limitations, it is a cardinal principle of modern law and of this court that they are to be treated as statutes of repose, and are not to be construed so as to de-

feat their obvious intent to secure the prompt enforcement of claims during the lives of the witnesses, and when their recollection may be presumed to be still unimpaired."

We submit that the singling out of executors and administrators in Section 778 of the Judicial Code for special limitation of the jurisdiction of the Federal Courts with reference to them within a period of two years in the revival of a cause of action is significant of itself and indicative of the intention to give them repose after that period.

Moreover, the Advisory Committee on the Rules in their 2nd Draft of Proposed Amendments to the present Rules filed in May 1945 at page 6 in notes under Rule 6, took occasion to express the following opinion:

> "As to Rule 25 in substitution, while finality is not involved, the limit there fixed should be *absolute, as it always has been by statute.*" (Underscoring ours.)

The Committee in their 3rd Draft filed in June, 1946, in their notes to Rule 6 at page 5 says:

> "As to Rule 25 on substitution, while finality is not involved, *the limit there fixed should be controlling.* That rule, *as amended*, gives the court power upon showing of a reasonable excuse, to permit substitution after the expiration of the two year period." (Underscoring ours.)

This Committee, therefore, admits the necessity for the limitation period of two years being kept as a fixed one, that executors and administrators are entitled to have it so for repose, and that only by amendment could

even Rule 25 be held to recognize a limitation other than the two year period. Their note under Rule 25 at page 32 of their report is as follows:

> "*Note.* This amendment guards against possible injustice in a case where there is some reasonable excuse for not applying for substitution within the 2-year period. It has been held that the court has no power to permit substitution after the expiration of the 2-year limit, irrespective of the circumstances. *Winkelman* v. *General Motors Corp.* (S. D. N. Y. 1939) 30 F. Supp. 112; *Anderson* v. *Brady* (E. D. Ky. 1941) 4 Fed. Rules Serv. 25a.1, Case 1; *Photometric Products Corp.* v. *Radtke* (S. D. N. Y. 1946) 9 Fed. Rules Serv. 25a.3, Case 1; *Anderson* v. *Yungkau* (C. C. A. 6th, 1946) 153 F. (2d) 685, cert. granted (1946) 66 S. Ct. 1025."

Counsel for petitioner have cited authorities to the effect that the word "shall" sometimes may be considered "may". In the Rule, however, it is submitted that the word "shall" was used advisedly in harmony with the lost jurisdiction under Section 778 of Title 28 of the U. S. Code.

It is argued on behalf of the petitioner that if the proposed amendments to the Rules to allow the courts to exercise discretion as to the revival of actions should later be adopted and the judgment of the Court of Appeals herein should be affirmed the petitioner will be deprived of "the right to obtain substitution under the circumstances in which substitution will not in the future be denied to other litigants". While failing to take into account the legislative and substantive nature of Section 778 of the Judicial Code and the basic restric-

tions against the abridgment, enlargement or modification of the substantive rights of any litigant by the Rules as provided by Sections 723 (b), 723 (c) of Title 28 of the U. S. Code, the petitioner is asking the Court to decide this case not on the law as it now is, but on new law possibly to be adopted in the future. It is not believed that protection against fraud and the protection of our military forces in time of war need to give the petitioner concern. Provision by the legislative body has been made as to both.

For the reasons we have given, we urge that the executors and administrators are entitled to the repose given them by Section 778 of the Judicial Code. We hardly think this Court will decide this cause on the basis of the law as it may later possibly be refrained through proper channels and not as it exists at this time.

The Court is respectfully requested to read the comments of the Court of Appeals as to *Wallace* v. *United States*, 142 Fed. (2d) 240 and *Winkelman* v. *General Motors Corp.*, 30 F. Supp. 112 and our briefs in the Court of Appeals and in opposition to the petition for writ of certiorari.

CONCLUSION

We respectfully submit that the definite period fixed for the revival of actions against executors and administrators by Section 778 of the Judicial Code could not be and was not modified in the Rules of Civil Procedure For District Courts and that the judgment of the Circuit Court of Appeals herein should be affirmed.

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Executor of Estate of
Alexander B. Massey, Deceased.

SUPREME COURT OF THE UNITED STATES

No. 87.—October Term, 1946.

A. M. Anderson, Receiver of National Bank of Kentucky, Louisville, Kentucky, Petitioner,

v.

Irvin Yungkau, Executor of the Estate of Albert Yungkau, Deceased; H. E. Franz, Executor of the Estate of William R. Gilpin, Deceased; Lucy Logan Massie, Executrix of the Estate of William K. Massie, Deceased, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[January 13, 1947.]

Mr. Justice Douglas delivered the opinion of the Court.

These are seven cases in which petitioner sued to recover stock assessments from shareholders of the Banco Kentucky Co. They were started in 1936 in the Eastern District of Kentucky and were stayed by agreement while the principal case upon which these depended, *Anderson* v. *Abbott*, 321 U. S. 349, wended its way through the courts. In the latter case we sustained the liability of the shareholders of Banco for the stock assessment. That was in 1944. During the time *Anderson* v. *Abbott* was being litigated, the shareholders involved in the present litigation died and respondents became executors of their estates. Through no lack of diligence,[1] petitioner failed to learn of these facts until more than two years later. Upon learning of them he promptly moved to revive the actions against the representatives of the decedents. The Dis-

[1] Petitioner brought actions against approximately 5,000 shareholders scattered throughout the United States and some in foreign countries. During the progress of the litigation some changed their residences. And it was stipulated that petitioner, with a limited staff, could not during this time keep up with the changes of residence or deaths of defendants.

trict Court, following *Anderson* v. *Brady*, 1 F. R. D. 589, denied the motions for revivor and granted motions of the executors to dismiss. The Circuit Court of Appeals affirmed by a divided vote. 153 F. 2d 685. The case is here on a petition for a writ of certiorari which we granted because the case presented an important problem in the construction of the Rules of Civil Procedure.[2]

The case involves a reconciliation of Rule 25 (a) and Rule 6 (b). So far as material here, Rule 25 (a) provides:

> "If a party dies and the claim is not thereby extinguished, the court within 2 years after the death may order substitution of the proper parties. If substitution is not so made, the action shall be dismissed as to the deceased party."

And the relevant part of Rule 6 (b) reads:

> "When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion . . . (2) upon motion permit the act to be done after the expiration of the specified period where the failure to act was the result of excusable neglect; but it may not enlarge the period for taking any action under Rule 59, except as stated in subdivision (c) thereof, or the period for taking an appeal as provided by law."

It is said that since by Rule 25 (a) substitution may be made within two years after the death of a party, substitution is, within the meaning of Rule 6 (b), an act "allowed" to be done "within a specified time" which the court may on a showing of "excusable neglect" permit to be done after the two year period. That argument is reinforced by reliance on the provision in Rule 6 (b) which grants but two exceptions to the power of enlargement of time. Since Rule 25 (a) is not included in the exceptions,

[2] Cf. *Ainsworth* v. *Gill Glass & Fixture Co.*, 104 F. 2d 83, with *Burke* v. *Canfield*, 111 F. 2d 526, and *Mutual Benefit H. & A. Ass'n* v. *Snyder*, 109 F. 2d 469.

it is argued that the time allowed by that rule may be enlarged under Rule 6 (b). And it is pointed out that the facts of the present cases establish that the failure of the receiver to act within the two year period was the result of "excusable neglect",[3] thus giving the District Court discretion to allow the substitution under Rule 6 (b).

We agree, however, with the Circuit Court of Appeals. Rule 25 (a) is based in part on 28 U. S. C. § 778, 42 Stat. 352, which limited the power of substitution to two years from the death of a party.[4] And even within that two year period substitution could not be made unless the executor or administrator was served "before final settlement and distribution of the estate". That statute, like other statutes of limitations, was a statute of repose. It was designed to keep short the time within which actions might be revived so that the closing and distribution of estates might not be interminably delayed.[5] That policy is reflected in Rule 25 (a). Even within the two year period substitution is not a matter of right; the court "may" order substitution but it is under no duty to do so. Under the Rule, as under the statute, the settlement and distribution of the estate might be so far advanced as to warrant a denial of the motion for substitution within the two year period. In contrast to the discretion of the court to order substitution within the two year period is the provision of Rule 25 (a) that if substitution is not made within that time the action "shall be dismissed" as to the deceased. The word "shall" is ordinarily "the language of command". *Escoe* v. *Zerbst*, 295 U. S. 490, 493. And when the same Rule uses both "may" and "shall", the normal inference is that each is used in its usual sense—the one act being permissive, the other mandatory. See *United States* v. *Thoman*, 156 U. S. 353, 360.

[3] See note 1, *supra*.

[4] But see *Baltimore & Ohio R. Co.* v. *Joy*, 173 U. S. 226; *Winslow* v. *Domestic Engineering Co.*, 20 F. Supp. 578.

[5] And see H. Rep. No. 429, 67th Cong., 1st Sess., p. 2.

Thus, as stated by the Circuit Court of Appeals, Rule 25 (a) operates both as a statute of limitations upon revivor and as a mandate to the court to dismiss an action not revived within the two year period. Rule 6 (b) relates to acts required or allowed to be done by parties to an action and permits the court to afford relief to a party for his failure to act within the prescribed time limits. There would be more force in petitioner's argument if Rule 25 (a) had, without more, set a two year period within which substitution might be made. But Rule 25 (a) does not stop there. It directs the court to dismiss the action if substitution has not been made within that time. That is action required of the court, not of a party. And Rule 6 (b) should not be construed to override an express direction of action to be taken by the court. See *Wallace* v. *United States*, 142 F. (2d) 240, 244.

Reasons of policy support this construction. It is, to be sure, stipulated that in five of the present cases the estate is "still open and undistributed"; in one it is 'still open"; in another it has been distributed. At least where an estate is ready to be closed or where there has already been a distribution, revivor may work unfairness and be disruptive of orderly and expeditious administration of estates. But it is not enough to say that if Rule 6 (b) and Rule 25 (a) are construed to permit substitution after the two year period, the court need not allow it where unfairness or prejudice would result. For the normal policy of a statute of limitations is to close the door—finally, not qualifiedly or conditionally. The federal law embodied in Rule 25 (a) has a direct impact on the probate of estates in the state courts. It should not be construed to be more disruptive of prompt and orderly probate administration in those courts than its language makes necessary.

Affirmed.

THE CHIEF JUSTICE and MR. JUSTICE REED took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 87.—October Term, 1946.

A. M. Anderson, Receiver of National Bank of Kentucky, Louisville, Kentucky, Petitioner.

v.

Irvin Yungkau, Executor of the Estate of Albert Yungkau, Deceased; H. E. Franz, Executor of the Estate of William R. Gilpin, Deceased; Lucy Logan Massie, Executrix of the Estate of William K. Massie, Deceased, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[January 13, 1947.]

Mr. Justice Rutledge, dissenting.

Rule 25 (a) provides:

> "If a party dies and the claim is not thereby extinguished, the court within 2 years after the death may order substitution of the proper parties. If substitution is not so made, the action shall be dismissed as to the deceased party. . . ."

I agree that the rule confers discretion to order substitution of parties, hence in appropriate circumstances to refuse to do so and thereupon to dismiss the action. But I do not think the discretion ends with the two-year period.[1] The rule is not worded to require this and ascribing such a construction to it brings it into collision with the express terms and the policy of Rule 6 (b). The difference made by expiration of the period is not to con-

[1] The Notes of the Advisory Committee on the original Federal Rules state that Rule 25 (a) "is based upon Equity Rule 45 (Death of Party—Revivor) and U. S. C., Title 28, § 778 (Death of parties; substitution of executor or administrator)." Prior to 1921 what is now 28 U. S. C. § 778 did not apply to suits in equity. Equity Rule 45, with its provision that a motion for substitution might be made within

vert the rule's command for dismissal from a discretionary to a mandatory one. It is merely to narrow the conditions under which the discretionary power shall be exercised.[2]

I find no basis for thinking that the time limitation prescribed by the first sentence of Rule 25 (a) was intended to be treated differently than any other prescribed by the Rules, except those concerning which they expressly forbid enlargement. The committee which drafted the Rules was highly competent, spent years in exacting preparation, and was thoroughly cognizant of what it intended to propose concerning time limitations. Meticulous attention was given to them. By count the index shows 134 references to provisions relating to time for taking various actions.

The committee knew their volume and variety. It was conscious also of the many difficulties and injustices which had arisen by virtue of rigid time limitations, whether laid by statute, rule of court, or judicial decision.[3] The deliberately chosen policy was to do away with those rigidities

"a reasonable time" was governing. But by 42 Stat. 352 it was provided that the revival of equity suits should be by *scire facias*, and a two-year statute of limitataions was made applicable. See 28 U. S. C. A. (1928) § 774 to End, p. 99, "Compiler's note."

However, in general the Rules were intended to supersede rather than incorporate previously existing statutory or other provisions, where the wording was different; and the committee's statement that Rule 25 (a) "is based upon Equity Rule 45" as well as 28 U. S. C. § 778, together with the different wording of the rule and that section, may indicate that the committee either considered Equity Rule 45 still effective, for which there seems to have been some judicial authority, see *Electropure Sales Corp.* v. *Knight*, 21 F. Supp. 451, 452; *Gaskins* v. *Bonfils*, 4 F. Supp. 547, 550–551, or intended to adopt it in substance as the basis and effect of Rule 25 (a). Had the purpose been to incorporate 28 U. S. C. § 778, there would have been no necessity for changing the wording, except in relation to the *scire facias* procedure. See note 10 *infra* and text.

[2] See text at note 6 *infra*.

[3] See Rules 6 (b), (c) and 60, all of which have received wide comment. See also notes 4 and 10.

and to substitute sound discretionary limitations, except as otherwise expressly directed.[4] This policy was stated clearly, fully and I think accurately in the Rules themselves by the addition of Rule 6, of which subdivision (b) is expressly applicable here.

By this unambiguous declaration it was provided that "the court for cause shown may, at any time in its discretion . . . (2) upon motion permit the act to be done after the expiration of the specified period where the failure to act was the result of excusable neglect."[5] This was applicable in any situation "when by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified period," with two and only two exceptions. These were to forbid enlarging the time for taking any action under Rule 59, except as stated in subdivision (c) thereof, and the period for taking appeal. Rule 73. The forbidden enlargements under Rule 59 involve matters concerning the granting of new trials.

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[4] See Proceedings of the Institute on the Federal Rules of Civil Procedure at Washington, D. C., and of the Symposium at New York City (1939) 83–84; Proceedings of the Institute on the Federal Rules of Civil Procedure at Cleveland (1938) 210–211; Hearings before the Committee on the Judiciary of the House of Representatives with Regard to the Rules of Civil Procedure for the District Courts of the United States, 75th Cong., 3d Sess., 60.

[5] The rule in full is as follows:

"Rule 6 (b) ENLARGEMENT. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period where the failure to act was the result of excusable neglect; but it may not enlarge the period for taking any action under Rule 59, except as stated in subdivision (c) thereof, or the period for taking an appeal as provided by law."

In those two respects and in them alone the time limitation was made, and was intended to be, "jurisdictional." For the rest the courts were to exercise discretion. It is to be emphasized that the limits of discretion fixed for enlarging time after the prescribed periods were narrowed by requiring that enlargement be made, if at all, only upon motion and only upon showing that the failure to act within time was due to excusable neglect.[6] Those limitations were applicable here, in my opinion, and admittedly they were satisfied.

Rule 6, including subdivisions (b) and (c), was thus a general and a carefully drawn declaration of paramount policy for the application of limitations of time. It made no distinction between rules governing actions to be taken by the parties and actions to be taken by the courts.[7] It made no exceptions other than the two expressly set forth. This Court approved the rule as drawn and Congress al-

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[6] See note 5. If Rule 25 (a) constitutes in effect a statute of limitations, as the Court holds, it may be inquired whether even upon proper application made within the two-year period under Rule 6 (b) (1), see note 5, the Court could enlarge the time by extension, as seems clearly contemplated by the clause "or as extended by previous order."

[7] See note 5. The rules are replete with provisions for action to be taken within specified periods by the courts upon their own initiative as well as upon motion by the parties. Rule 6 (b) is itself an illustration. Certainly it cannot be said, in view of the rule's comprehensive language, that it applies only to actions to be taken by the parties and has no application to the large number of instances in which limitations of time are imposed for action to be taken by the courts. Such a construction would bring back many of the evils the Rules were designed to avoid. It would defeat perhaps as many of the literal and intended applications of Rule 6 (b) as it would preserve.

Rule 6 (c) is as follows: "The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the expiration of a term of court. The expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it."

lowed it to become law without modification. To assume or to rule that additional exceptions were intended is to assume that the committee, the Court and Congress overlooked others which should have been stated in Rule 6 (b)[8] or did not intend the declared policy of that section to be effective fully according to its terms. I am unable to accept either conclusion. If we may make an additional exception forbidding enlargement of time in cases covered by Rule 25 (a) in the face of the express provision of Rule 6 (b), there is no reason why others may not also be made, and thus the salutary policy of Rule 6 (b) be defeated.[9]

The considerations of policy said to support the decision would be grounds either for the district court's consideration in determining whether to deny enlargement in the exercise of its discretion or for amendment of Rule 6 (b) so as to exclude such cases as this.[9] They are not a basis in my opinion for changing that rule by interpretation or for opening the door to further restrictive amendments of Rule 6 (b) in this respect by that process. If this is to be done, it should be by the prescribed rule-making procedure. Indeed the Advisory Committee, in the recently proposed amendments to the rule, has recommended that Rule 25 (a) be rephrased so as to eliminate any question that the rule has the meaning ascribed to it in this opinion. And its note appended to the recommendation states that the purpose is to guard against injustices likely to

[8] The Advisory Committee in its Report of Proposed Amendments to the Rules of Civil Procedure (1946) 2–6 points out that District Courts and Circuit Courts of Appeals in some cases have refused to apply Rule 6 (b) to other Rules as well as Rule 25 (a); see, *e. g.*, *Wallace* v. *United States*, 142 F. 2d 240; *Reed* v. *South Atlantic S. S. Co.*, 6 Fed. Rules Serv. 60 b. 31, Case 1; *Mutual Benefit Health & Accident Ass'n.* v. *Snyder*, 109 F. 2d 469; cf. *Burke* v. *Canfield*, 111 F. 2d 326, though other cases have ruled the other way. See, *e. g.*, *Schram* v. *O'Connor*, 5 Fed. Rules Serv. 6 b. 31, Case 1, Case 2; *Ainsworth* v. *Gill Glass & Fixture Co.*, 104 F. 2d 83.

[9] But see note 10 and text.

result from a flat two-year limitation.[10] In my opinion the committee's action and the reasons given for it confirm, rather than disavow, the section's originally intended meaning.

This case is an illustration of the kinds of injustice the committee sought to avoid. And the considerations

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[10] Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States (1946) 31–32.

The revision of Rule 25 (a), recommended by the committee reads as follows, the revised matter appearing in italics: "If a party dies and the claim is not thereby extinguished, the court *upon application made* within 2 years after the death *shall* order substitution of the proper parties. *If the application is made after 2 years the court may order substitution but only upon the showing of a reasonable excuse for failure to apply within that period.* If substitution is not so made, the action shall be dismissed as to the deceased party . . . ."

The committee appends the following comment: "This amendment guards against possible injustice in a case where there is some reasonable excuse for not applying for substitution within the 2-year period. It has been held that the court has no power to permit substitution after the expiration of the 2-year limit, irrespective of the circumstances. *Winkelman* v. *General Motors Corp.* (S. D. N. Y. 1939) 30 F. Supp. 112; *Anderson* v. *Brady* (E. D. Ky. 1941) 4 Fed. Rules Serv. 25a.1, Case 1; *Photomatic Products Corp.* v. *Radtke* (S. D. N. Y. 1946) 9 Fed. Rules Serv. 25a.3, Case 1; *Anderson* v. *Yungkau* (C. C. A. 6th, 1946) 153 F. (2d) 685, cert. granted (1946) 66 S. Ct. 1025."

In its comment relating to Rule 6 (b), pp. 2–3, the committee states: "In a number of cases the effect of Rule 6 (b) on the time limitations of these rules has been considered. Certainly the rule is susceptible of the interpretation that the court is given the power in its discretion to relieve a party from failure to act within the times specified in any of these other rules, with only the exceptions stated in Rule 6 (b), and in some cases the rule has been so construed."

"With regard to Rule 25 (a) for substitution, it was held in *Anderson* v. *Brady* (E. D. Ky. 1941) 4 Fed. Rules Serv. 25a.1, Case 1, and in *Anderson* v. *Yungkau* (C. C. A. 6th, 1946) 153 F. (2d) 685, cert. granted (1946) 66 S. Ct. 1025, that under Rule 6 (b) the court had no authority to allow substitution of parties after the expiration of the limit fixed in Rule 25 (a)."

of policy are not altogether one-sided. The effect of the decision in such a case as this is not only to throw an admittedly impossible burden upon the party seeking without neglect to enforce his cause of action. It is also to throw upon other parties, equally helpless, a heavier burden of financial loss, whether by depriving them of rightful recovery or by forcing them, in some instances at least, to bear a larger share of the common responsibility.[11]

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[11] The statutory liability of shareholders in national banking associations was created by 12 U. S. C. §§ 63, 64. By § 63 the shareholder was made "individually responsible, *equally and ratably and not one for another*, for all contracts, debts, and engagements of such associations, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." (Emphasis added.) By § 64 the shareholder was made "individually responsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock."

To what extent § 64 may have modified § 63 has been disputed. See *American T. Co.* v. *Gray*, 80 F. 2d 155; *First Nat. Bank* v. *First Nat. Bank*, 14 F. 2d 129. But in *Anderson* v. *Abbott* we said: "It is sufficient at this time to state that the liability of the shareholders of Banco would be measured by the number of shares of stock of the Bank, whether several or only fractional, represented by each share of stock of Banco; and that the assessment liability of each share of stock of Banco would be a like proportion of the assessment liability of the shares of the Bank represented by the former." 321 U. S. 349, 368–369. And in *Frank* v. *Geisy*, 117 F. 2d 122, 125, it was held that the omission in § 64 of the pro rata limitation of § 63 was intended to strengthen the position of creditors, making each shareholder's liability several and fully enforceable though others go free. In *First Nat. Bank* v. *First Nat. Bank*, *supra*, the shareholder made to pay was held entitled to enforce contribution against others not proceeded against. The shareholder's liability is secondary only, *McClaine* v. *Rankin*, 197 U. S. 154, 161; *First National Bank* v. *Nichols*, 294 Mass. 173, 181; and though one is not relieved either wholly or in part because others are not compelled to pay, neither is any required to pay more proportionately than is needed from the fund actually collected to discharge the bank's obligations. *Bank of Ware Shoals* v. *Martin*, 47 F. Supp. 61, 63. The liability is not a debt but is one

In my opinion the judgment should be reversed and the cause remanded to the District Court for the exercise of the discretion given by the Rules.

MR. JUSTICE BURTON joins in this dissent.

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merely assuring payment of the bank's obligations. *McClaine* v. *Rankin, supra.*

The Court's decision therefore in effect cuts off any possibility shareholders forced to pay may have for reduction of the amounts of their payments either through the receiver's enforcement of the liability directly against decedent shareholders' estates or by seeking contribution from them after the two-year period. And this is done regardless of the estate's comparative ability to pay, of whether it is in an early or a late stage of administration, and of when the death occurs. Thus, in these cases, only one estate has been closed and one other is nearing that stage; but so far as appears the other five remain open and undistributed.

The suits were begun in 1936. Eight years were taken up for litigation of the principal issue of liability in *Anderson* v. *Abbott, supra.* That liability having been established after so long a time, now eleven years after the suits were instituted this decision comes to nullify it in substantial part and effect. The result, in my opinion, is quite as much to make the protection afforded by these statutes turn on accidents of life and death in some instances, perhaps in many, at variance with the nature of the liability and its fair administration, as other distinctions were said in the *Anderson* case to make the protection turn on irrelevant accidents. 321 U. S. at 367.